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HISPANICAE ADVOCATIONIS
LIBRI DVO

BY ALBERICO GENTILI

VOL. I. A Photographic Reproduction of the Edition of 1661, with an Introduction by Frank Frost Abbott, and a List of Errata.

VOL. II. A Translation of the Text, by Frank Frost Abbott, with an Index of Authors prepared by Arthur Williams.

This volume with Vol. I constitutes No. 9 of "The Classics of International Law." A list of the numbers already published is given at the end of this volume.

HISPANICAE ADVOCATIONIS LIBRI DVO

BY

ALBERICO GENTILI

VOLUME TWO

THE TRANSLATION

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TRANSLATOR'S PREFATORY REMARKS

THE TEXT

The unique character of the *Hispanica Advocatio* among the legal writings of its time, in so far as it has a bearing on the task of the translator, deserves a word of comment here. As is well known, the book was brought out several years after Alberico Gentili's death, by his brother Scipione. Consequently it did not have the benefit of a final revision at the author's hands. This fact may explain in part the comparatively large number of errors which the text seems to show. If Alberico had lived to publish the book, very likely also he would not have contented himself with bringing out his work in the form which it takes, of notes on the cases in which he interested himself, but he would have expanded his summaries into detailed arguments. Inasmuch as many of Gentili's cases are presented in this very condensed form, with reasons rather suggested than directly stated, and with sentences occasionally given only in part, and since the argument usually presupposes a knowledge of facts with which the court was familiar, but of which we are sometimes ignorant, the logical connection and the meaning of a sentence is at times left in doubt. The reader is requested to bear these facts in mind, if at any point his understanding of the meaning of the Latin text differs from that of the translator. Corrections and emendations necessary from the point of view of the translator are listed at the end of Volume I.

MODE OF CITATION EMPLOYED BY GENTILI

The marginal references for a particular chapter in the Latin text are grouped at the end of the chapter in the translation, and at the end of this book there will be found a list of the authors and books cited by Gentili in these references or in the body of the text. The citations may be conveniently classified under four heads—references to the Civil Law, to the Canon Law, to Commentaries on the Civil or Canon Law, and to other authorities.

For the *Corpus Iuris Civilis* Krueger's edition of the Institutes and of the Justinian Code, Mommsen's edition of the Digest, and the Schoell-Kroll text of the Novels are the most satisfactory. Our practice today in making citations from the Civil Law is to pass from the larger division to the subdivision. Thus D. 49, 15, 19, 3

means Digest, book 49, title 15, law 19, paragraph 3.[1] In Gentili there are three headings regularly. Of these the main division stands at the end of the citation, the subdivision next below it at the beginning, and the smallest subdivision in the middle. Thus the reference to the Digest just given appears in Gentili (I.ch.1.a)[2] in the form *l.* 19. §. 3. *de capt.* From the index which is prefixed to the texts of Mommsen and Krueger *de capt.* can be identified as D. 49, 15 and we at once have the complete citation D. 49, 15, 19, 3. Books 30, 31, and 32 of the Digest are cited *de leg.* 1, *de leg.* 2, and *de leg.* 3 respectively, so that *l.* 41. §. 2. *de leg.* 1 (I.ch.1.c) means D. 39, 41, 2. Occasionally a law is cited not by its number, but by its first word. Thus *l. cotem. D. de publican.* (*Advocatio* I.xx.b) = D. 30, 4, 11. In a few cases the Digest is cited by the symbol ff, as in the *Advocatio* II.xviii.kk where *l. injuriarum.* §. 1. ff. *de injur.* = D. 47, 10, 13, 1. The part of a law which precedes the numbered paragraphs is referred to as *principium*, and the last law under a title as *lex ultima.* Examples are seen in the *Advocatio* I.i.b where the citation is *l.* 5 *princ. de capt.* and in the *Advocatio* II. xxv. l where the reference *l. ult. de re jud.* is to D. 42, 1, 64. References to the Justinian Code and to the other parts of the Civil Law are drawn up in a similar way. For instance, (*Advocatio* I. vii. ll.) *l.* 6. C. *de aedif. pri.* = C. 8, 10, 6; (*Advocatio* I. xv. a) *l. omnes. C. de quad. praes.* = C. 7, 37, 2; (*Advocatio* I. xx. b) *l.* 2. 4. *ult. C. de commer.* = C. 4, 63, 2, 4, and 6. The Novels in Gentili are called *Authenticae.*

The Canon Law, it will be remembered, is represented by the Decretum of Gratian and by the collections made since the twelfth century. The *Decretum Gratiani* falls into three parts. Part I is divided into 101 *distinctiones,* which in turn are subdivided into *canones.* Part II is divided into 36 *causae,* subdivided into *quaestiones.* Part III is divided into 5 *distinctiones,* subdivided into *canones.*

The material which has been brought together since the twelfth century consists of the following parts: *Decretales D. Gregorii Papae IX*, divided into *tituli,* subdivided into *capitula; Liber Sextus Decretalium D. Bonifacii Papae VIII,* divided into *tituli,* subdivided into *capitula; Clementis Papae V Constitutiones,* divided into *tituli,* subdivided into *capitula,* and finally the *Extravagantes,* divided into *tituli,* subdivided into *capitula.*

[1] For the benefit of the general reader, a more extended abbreviation has been given in the translation for the main divisions of the Civil and Canon Law, as *Dig.* for Digest and *Decr.* for Decretum. Otherwise reference is made as indicated above.

[2] This refers to bk., chap., and reference, and applies both to the Latin text and to the English translation. The numbers in the outside margin of the translation indicate where new pages begin in the Latin original. Pages i-xvi are unnumbered in the original.

The Canon Law is very rarely cited by Gentili. When he has occasion to refer to it, his method of citation is not unlike the method which he follows with the Civil Law, that is, he quotes the opening words of the main division to which reference is made. Now by consulting the indices on pp. 1312-1339 of Vol. II of Friedberg's edition of the *Corpus Iuris Canonici* (Berlin, 1879-1881), the passage sought may be found. Thus reference fff in the last chapter of the *Advocatio, c. ult. de aet. & qual.*, means Lib. I, Tit. 14, c. 15 of the Decretals of Gregory IX; *c. 2. dist.* 77 in the same place means Dist. LXXVII, c. 2 in the *Decretum Gratiani.*

The third class of citations is from commentaries on the Civil or Canon Law and from treatises on legal subjects. The index of authors cited, given at the end of this translation, will serve as a key to these references. Thus (*Advocatio* I.1.c) *Bar. alii l.* 5. §. 1 means Bartolus and others on D. 49, 15, 5, 1, and in the same place *Bal. l.* 8. *C. de exe. re. jud.* means Baldus on C. 7, 53, 8. An explanation of certain other abbreviations will be found in the note preceding the index.

In a few cases the same proper name varies slightly in spelling at different points in the Latin text. In the translation each of the names in question has been given a uniform orthography.

ACKNOWLEDGMENTS

The translator owes much to his friends and former pupils, Prof. J. W. Cohoon of Mt. Allison University, and Mr. Arthur Williams, lately a colleague in this University, whose scholarship and critical acumen have been of great assistance to him in solving many of the difficulties which the obscure passages of Gentili's work present. Mr. Williams has also prepared the Index of Authors and arranged the references. To Dr. E. C. Richardson, of the Princeton University Library, he is indebted for assistance in bibliographical matters. He is also under great obligation to Dr. Herbert F. Wright, of the Carnegie Endowment, for a careful and helpful criticism of the book while it was passing through the press.

Frank Frost Abbott.

Princeton, March 1, 1918.

[*The Title-Page of the Edition of 1661*]

THE TWO BOOKS [i]
OF THE PLEAS OF A SPANISH ADVOCATE OF ALBERICO GENTILI, JURISCONSULT

(In which treatise different famous maritime questions according to the Law of Nations and the practice of today are explained and settled as clearly as possible).

To His Most Illustrious and Excellent Lordship,

DON BALTASAR DE ZÚÑIGA,
Ambassador of His Catholic Majesty.

With Index of Chapters, Subjects and Words.
Second Edition and More Correct than the First.



AMSTERDAM
AT THE HOUSE OF JOHANNES VAN RAVESTEYN
Ordinary Printer of the City and of the Famous University
1661

To his most illustrious and excellent Lordship, [iii]
Don Baltasar de Zúñiga,
Counselor to the Privy Council of His Catholic Majesty and
Ambassador at the Court of His Imperial Majesty,

Scipione Gentili sends many greetings.

What my brother, Alberico Gentili, had himself planned to do, had he lived, that, at his death, in his will he instructed me to do. Now, although he had given instructions to have all [iv]
the numerous commentaries on the Civil Law which he left behind him suppressed or destroyed, he made an exception of this one book, which he wished me to edit, because it was more nearly complete and more carefully revised than the others. It contains discussions of those controversies which Spaniards and other subjects of His Catholic Majesty carried on in the kingdom of England with foreigners, and for the most part, with the Dutch, beginning with the time when the most serene and wise King, James I, ascended the throne of that most flourishing realm. After he had made peace with Spain and signed treaties, although he was, so to speak, an intermediary between two nations which were divided by a very bitter and almost internecine war, still he remained the friend and ally of both. Consequently, he could not help allowing the controversies and quarrels which these peoples had referred to him to be settled in accordance with the principles of law and equity. Not all of them are private [v]
cases, or cases pertaining to private citizens only, but some of them are also of a public nature, for they deal with the law of war and the law governing kingdoms and treaties. Charge of all these matters and care for his Spanish fellow-citizens necessarily rested on the man who acted in England at that time as ambassador in the name of your Catholic King.

The ambassador at that time was your kinsman, the most illustrious and excellent Don Pedro de Zúñiga, a man who surpassed his ancestors in the distinction which caused your family

to be numbered among the leading families in all Spain, a man who had filled with distinction all the highest offices in the Commonwealth, a man who, furthermore, was eminent for his virtues, his wisdom, his distinction, and especially for his kindness. By him my brother was most courteously requested to assume the advocacy and defense of all those cases which I have
[vi] mentioned, and at a salary which did him honor. He obtained my brother's consent, and that too with the approval and sanction of the King of Great Britain, in whose realm my brother was. On taking this step, he found by actual experience that he had conferred no small advantage on the people of your nation by availing himself of the services of my brother, and he never [repented] his decision or the judgment which he had formed of my brother's diligence, fidelity, uprightness, and extraordinary learning.

My brother had been engaged in these duties for three years when to the great sorrow, as I have learned, of the most illustrious ambassador, who had loved him deeply, and of all good men, he died. Although this misfortune had naturally afflicted me beyond measure, because of the close relation into which kinship, studies, and all our pursuits had brought us, still the personal loss did not move me so much as did the disaster suffered by the community in the field of Literature, and still more, of Jurisprudence.

[vii] To say nothing of his other writings and studies, which he in part brought out during his lifetime and in part left unfinished or roughly sketched; by his death what a series of most notable cases has gone, what means have been lost of increasing our legal knowledge, which seems to be hemmed in and circumscribed by the too narrow limits of the private law! If we had no other proof of it, this book, at all events, could furnish, if I mistake not, very complete and clear evidence. But assuredly the saying is true beyond a doubt, that brilliant men who have been born to serve letters and the Commonwealth always seem to die prematurely.

Therefore, most illustrious master, I send this book to you, and I dedicate it to you for the best of reasons, as I think; for

to whom is the writing of Spanish pleas undertaken in foreign realms more properly due than to the Spanish ambassador? To [viii] whom is a book containing pleas made for Spaniards in the Royal Council Chamber more properly due than to the spokesman of the mighty King of the Spains at the Court of his Imperial Majesty? Under whose protection should this book take refuge if not under the protection of him who sprang from that family to which the man belonged who gave this book its inspiration and life? To crown all, is your remarkable kindness which leads everyone to love and cherish you, a kindness to which are joined matchless virtues and the greatest distinction. We have ourselves often seen you in this great and most illustrious imperial City of Nuremberg; and seeing you, we seemed to behold the mighty king himself, as it were, and the mighty power of Spain. What else is an ambassador than the life and face of him by whom he has been sent and whose person for that reason he presents to us, as we believe. May all good fortune attend your most illustrious Excellency, and may you deign to [ix] look with a kindly eye upon this token of my respect.

Dated at Nuremberg, February 1, 1613.

To the most illustrious and learned man, [x]
His Lordship Scipione Gentili, Jurisconsult, Counselor of the Commonwealth of Nuremberg, most distinguished Predecessor, and beloved Friend and Colleague,

Concerning the Writings of his Brother, likewise a Man of the greatest Renown, a Jurist of the greatest Eminence, His Lordship Alberico Gentili, Regius Professor and Royal Advocate, etc.

Most brilliant and splendid figure among jurists, chief glory of this Lyceum, Scipione: when the report first came from Britain that thy brother Alberico—that great man—had left this tragic-comic stage of life, and that thy father, Matteo, had followed along that road which all mortals must once tread, as well kings and the distinguished scions of kings, as the dregs of the common herd to whom birth has been granted, I remember that thou didst seem almost overwhelmed by the violence of thy grief and that thou didst seem to be leading a bitter life, robbed as it were by his death of half of thyself—robbed of half of thy heart and life.

This was the power of love and the force of nature to which even the wise man yields obedience; his fiber is not of horn and flint, [xi] and he does not war against nature, as if he were Gigas.

Now thou hast yielded enough to grief and to mourning which has its own limits, as all things have. Now the mighty queen, reason, comes forth, and brings the dead to life, to life, I say, through his many great services and through his books which cover all the fields of learning, for by his books he has gained for himself a second life even in this world, not to speak of life in the other world, which God gives freely to mortals, and has already given and will give henceforth to Alberico, in addition to a crown of blessedness.

But with what praise will those learned in the law deservedly attend thee, Gentili, most distinguished glory of this body, and what thanks will they pay thee for thy deserts in bringing to light the posthumous writings of thy brother, an earnest of which at this moment are the "Spanish Pleas" which we owe to thine industry. Pray, let us owe to thee in the future more writings of this sort, in which the fame of each of the Gentili flourishing beyond the grave may prove the concord of brothers, concord which is the dearest blessing of life. [1]

[1] [In the Latin text this letter to Scipione Gentili is composed in iambic senarii.]

[xii] To the Same Person.

A good and wise man brings profit to the human race, even after his death. Of this, most illustrious Scipione, thy brother is a proof, a man above my praise, and famed for his merits throughout the world. The books which he sent forth during his life, and ten times over corrected in every jot and tittle, these even Themis approves.

Themis approves likewise those which, death forbidding, he could not publish. Now may affection drive thy soul on to bring to light his posthumous works. Hence, as gratitude is due to thy brother, the author, deep gratitude attends thee also. This noble proof of thy brotherly loyalty and love generations to come will sing of, and glory, which knoweth not death will carry the brothers Gentili to the stars of the sky. [2]

CONRAD RITTERSHUYS,
Brother-jurist.

[2] [In the Latin text this letter is cast in the form of the first Archilochian strophe, *i.e.*, it is composed in couplets in which a dactylic trimeter catalectic follows a dactylic hexameter.]

INDEX OF CHAPTERS [xiii]

Book I

[1 The numbers in brackets refer to pages of this translation.]

[xv]

Book II

[1 The numbers in brackets refer to pages of this translation.]

THE FIRST BOOK OF THE PLEAS OF A SPANISH ADVOCATE OF ALBERICO GENTILI 1

Jurisconsult, Regius Professor

CHAPTER I

Whether There Is Postliminium in the Domain of a Common Friend

"A person who has reached a state or king allied or friendly seems to have returned by postliminium,[a] inasmuch as at that point, through the authority of the state, his safety begins for the first time," [b] says the law, and another law reads: "It is understood that a person is back again from the moment when he either reaches our friends or sets foot within our fortified lines."

But the question at issue was whether certain Lusitanians, who had been taken prisoners by Dutch enemies on the Spanish sea, became free here in England, by way of which they were being taken to Holland. And it was thought that here in the domain of a common friend they do not become free, because the law does not speak of "a common friend" but expressly mentions "our friend." [c] Indeed "our" may mean something quite different from "common," and this opinion is generally held by the doctors. And in this way those laws concerning allies bound to one people only, and enemies of the other party,[d] are interpreted by the doctors who hold that a state has the power to decide under these laws that its enemy may be put to death in an allied state. Which is clearly untrue for a state having a common alliance [i.e., allied with both parties]. Furthermore, Baldus expressly adopts this interpretation in the case of enemies of the other party. Likewise Baldus also applies the 2
same laws to the friends of the Roman people [e] who were usually required to hold as friends and as enemies those whom that imperial people held as friends and as enemies.

Furthermore, it may seem that Romans did not return by postliminium on coming to a common friend. Or why is it that [f] there were in Greece a great many slaves of Roman descent whom fortune had brought there during the Punic War? Did the Achaeans set them free and give them to Quintius? Was Greece not friendly but unfriendly to the Romans?

[g] Finally that postliminium may not exist in the domain of a common friend Antonius Gama makes a show of establishing in his Lusitanian decisions—a Lusitanian authority who ought to count for a great deal against Lusitanians, although he has none of the afore-

said points. In general he has nothing on which to base this understanding of the laws or his interpretation.

We took the opposite view in the discussion, and we urged the well recognized point that where the law makes no distinction we too ought not to make one, and since the law does not speak of a friend attached to ourselves only or make that distinction, then we ought not to speak of one attached to ourselves only. The law speaks of a friend; it speaks of our friend,[h] and our friend is different from a friend attached to ourselves only. Consequently, the word "our" will be applied not to a friend attached to ourselves only, but it will be understood as used of a friend common to both parties. [i] And in point of fact many people teach that "our" actually applies not to what is peculiar to ourselves but to what we share with others. [k] And undoubtedly this is true in the case of individuals. Therefore a man is called my freedman although another person and I have rights in common over him. But a friend and an ally has also without doubt the character of an individual, just as a freedman has. Furthermore, in the preceding discussion, in cases where beneficent action is involved, "our" (*noster*) is taken in the sense of "common" (*communis*). Now postliminium is beneficent in its operation. Its beneficent outcome is freedom. And to the same purport elsewhere
3 there are many generally accepted dicta which support us in holding that a common friend is not excluded from consideration by the laws which grant us postliminium when we reach our friends.

It is also true that, if we understand these laws as being solely applicable to a friend attached to ourselves only, they would apply to a case not open to doubt, or, at any rate, to a case less open to doubt. [l] However, since a law ought to deal with a doubtful matter, it ought also to be understood in a more doubtful case. But who would be in doubt whether postliminium exists in the domain of a friend and ally attached to ourselves only, that is to say, even (as Gama himself puts it) in the domain of one who is an enemy to the other side? But Gama's interpretation is opposed to the fundamental notion of the law [m] which establishes postliminium for the point where we are safe; but that we are safe with the ally or with the friend of both parties no one who has eyes will deny.

What I have said elsewhere of the sovereign power of the mighty Roman people does not oppose our argument, [n] because their laws rather concern all other peoples who had no share in that sovereign power and who did not have the same method of binding their allies to them. Even the fact which I have mentioned with reference to the captives and slaves in Greece does not militate against this view. One would be bound to show that they came to friends—in time of war too, because the Romans deny the existence of post-

liminium in time of peace. Furthermore, in the time of Quintius, there had been little intercourse between the Greeks and the Romans, and close relations between them began at that time, as Plutarch writes. What if you were to say too that the Romans, of whom we were speaking, came to Greece, to their friends, through the avenues of trade, and were sold by the Carthaginians? [o] One may maintain that postliminium does not exist in this case, and that the buyer has the right of ownership; with good reason because, if another view should be held, opportunity might be given the enemy of venting his rage on the captives whom allies and common friends could not buy, seeing that in their country the captives would regain their liberty at once. Or opportunity might be taken to send these cap- 4
tives to barbarous peoples, who were more remote, and to other more savage enemies, from whose land return would be extremely difficult. [p] Felynus fitly remarks that "this point applies more particularly where captives taken by infidels are concerned, from the risk that they may be led by violence or treachery to adopt the infidel's manner of life."

Finally against Gama and against his unheard of distinction one ought to observe that he even speaks against a judgment rendered by a College [or bench of judges]; [q] and the decisions of the Colleges are of more weight even than those of a most distinguished jurist. [r] This is the point which the Rota of Genoa makes against the writer of the decisions of the Rota of Avignon, that the decision was that of the writer, not that of the Rota. Others make the same objection to a ruling of Afflictis, that he stands opposed to the rest of the College. Other writers make the same point in other similar cases.

Now in continuing I would say of Baldus and of the other doctors that he hesitates, and that all of them are talking of a proscribed person, that is of a man regarded as an enemy because of an offense which he has committed. [s] Such a man is comparable to a fugitive. But they are not talking of an enemy who is waging war, as is the case here. Between him and the other there are very marked differences. [t] Likewise they apply this doctrine when an agreement has been reached between allies, or when the treaty provides that the territory of the allies shall be regarded as a unit. And Baldus says that an alliance has no greater and no less scope than the agreements themselves cover. I maintain too that one situation presents itself when we are dealing with punishment, which is of course an unpleasant thing, and which can be inflicted solely in the confines of an ally attached to ourselves only; but, when, as in this case, the freeing [of people and property] is concerned, which is a beneficent act, another situation comes up for discussion.

This argument I made against very eloquent and learned advocates, and yet I did not press it to the point of maintaining, in violation of what I know is the accepted practice, that property and spoils, which already belonged to the Dutch, should be lost to them in a friendly realm.

a—l. 19. §. 3. de capt.
b—l. 5. princ. de capt.
c—Bar. alii l. 5. §. 1., l. 41. §. 2., de leg. 1.
d—Ias. l. ult. de Iurisdict.; Bal. l. 8. C. de exe. re. jud.; Menoch. 1. de arb., ult.
e—Alb. 3. de jur. bel. 18.
f—Plut. in Flam. et in apopht.
g—Gam. decis. 384.
h—Com. l. 5. de leg. 1.
i—Zas. Aret. Alex. alii d. l. 5.; Rebuff. l. 96. 139. de V. S.; Decia. 2. cons. 43.
k—Alc. d. l. 5. §. Labeo.
l—l. 1. ad municip.; l. 9. C. de arb.; Flor. l. cum quis, §. Titia. de leg. 3.; Panor. c. 33. de ele.; Ceph. cons. 431.; Menoch. 3.; Grib. 1. de ra. stu. 5.
m—Soc. ju. l. 1. n. 71. de adq. pos.
n—l. 24. de capt.; Alc. l. 5. de ju. et ju.; Soc. l. 1. de adq. pos.; Ias. l. a divo Pio. §. sententiam. n. 13. de re jud.
o—l. 8. de re mil.; l. 15. de capt. ubi gl.
p—Feli. c. 11. de Iudae.
q—Non. cons. 23. 53.; Odd. 8.; Menoc. 11. 34.; Rip. 3. de ca. po. & pr.
r—Menoc. cons. 329.; n. 27. Ro. Ge. Chars. decis. 106.
s—Bar. q. 1.; Myns. cons. 21.
t—Deci. l. ult. de ju.; Bar. l. cunctos populos. nu. 44.; Clar. § fi. q. 38. nu. 10. et q. 71. nu. 11.

CHAPTER II 5

That Property Does Not Belong to the Enemy Who Takes It Until It Has Been Brought within His Fortified Lines

Therefore I have boldly maintained another point, and I have argued effectively against Antonius Gama in holding that property taken by the enemy is not acquired by him until it has been taken clear through to a point within his fortified lines. This is true, however long the property may be in his possession. It is true of this property, held, though it was, for more than two months at sea. [a] In fact the law stipulates that it be captured and taken clear through to a point within the enemy's confines. "They have captured and taken it clear through to a point within their confines," it says. Here the expression "to take clear through" (*perduco*) deserves notice. This expression the law has used several times. It indicates the completion of a task, [b] for *per* indicates totality. [c] For this idea the law uses very frequently also the expression "to come clear through" [d] and it ought to be taken to imply successful accomplishment. If two months do not suffice for the captor, a thousand would not. Property must be captured and brought within the captor's confines. Time counts for nothing. The law does not take it into account. Indeed time counts for nothing in this case, where booty is always of doubtful ownership so long as it has not been taken within the captor's fortified lines. The proverb goes "there's many a slip 'twixt the cup and the lip," and the nature and lot of war abundantly prove the truth of it, [e] as I have maintained at length elsewhere.

In the case which I took up for the Spaniards, who were taken prisoners by the Dutch, there was a stretch of the sea to be crossed; there were the shores of the enemy to be skirted, and the people of these regions too were on the watch to prevent the taking of booty and were prepared to checkmate it. Disaster coming from the weather and the sea were also to be feared. Therefore, the law properly stipulates that property be brought within the fortified lines. But it is clear that a ship to which captured goods had been brought does not constitute a fortified line, [f] for a ship is classed 6
as a movable thing. A fortified line, however, is something stationary. [g] A ship does not rest; it moves, and is comparable to a vehicle, or rather to a horse—"He rode over the Sicilian waves," as

Horace puts it. "You were carried on a wooden horse over the dark-blue stretches," as Plautus writes. [h] A place within the confines and presumably safe constitutes fortified lines, as Salycetus, Castrensis, and Angelus remark. [i] Still I should say that fortified lines would include the fleet of the Greeks standing off Troy, or even a camp pitched within the confines of an enemy, or the fleet of an enemy which was cruising about. But our situation was this, that a Dutch vessel had captured a Spanish ship, was taking her capture to Holland, and had already convoyed her over the sea for two months, as I have said.

Let us see if there are any fundamental points in Gama's reasoning to prove that it is not necessary for captured property to be brought within fortified lines. What the enemy has taken becomes his at once and without delay, he says, and Angelus, Socinus and Ripa so hold. [k] "At once" means forthwith, thereupon, without delay, as Aretinus in this connection explains this particle, and as I add to what Gama says. However, in the passage cited by him, Angelus and Socinus in my books have not a word on the point whether it is necessary that property be brought within the fortified lines. [l] Angelus elsewhere remarks, "I say then that captured booty has become the property of an enemy when and if it has been brought within the fortified lines of the enemy taking it. Furthermore, by fortified lines I mean places which are safe and capable of defense because they are inclosed by walls and other means of protection or encompassed by structures lying near one another. In that case the booty has become the property of an enemy because it has been conducted to its destination and is safe. Before it is within the fortified lines described above, or at some other safe point, in the territory of friends or allies, I do not deny that the booty has passed under the control of the captors, granted that it has come into the territory of the captors. Still, in view of the vicissitudes of war it may be recovered, and those who have it must naturally
7 remain in doubt on this point, and the fear which I have mentioned establishes the point which I make." This is what Angelus says.

[m] But Ripa says: "Goods captured in war belong to the captors at once. But one asks how the words 'at once' in this connection should be taken. It seems necessary to understand them as meaning within three days, or after he from whom the goods have been taken turns to other matters, and consequently after he ceases to possess the property, thinking that he cannot recover it. But the glossator, Salycetus, and Angelus understand 'at once' to mean after the captured property has been brought back within the fortified lines." In that very connection Ripa adds that Angelus follows this principle elsewhere also and that he cites a law,

but that he has a better one to adduce. And Ripa cites the law which we have quoted.

Without purpose would the law have said, " they have captured and have taken to a point within their lines," if it meant that to have made a capture is enough. [n] All the words of the law ought surely to be taken into account. Now a copula, this is the popular word, implies the union of the things copulated. The law which Angelus puts forward ordains that the thing must be safe if it is effectually in the possession of the captors. And, therefore, it means that it has been brought within the fortified lines, where at last it is safe. [o] The words must be understood of effective action, as likewise the common rule requires. And so, if a statute gives a reward to one who captures a proscribed person, the meaning is when the claimant has made an effective capture and has brought the captive before his superior. To acquire property the Dutch are bound to have made an effective capture of it; but they have not made an effective capture of that which they have not yet brought within their fortified lines. Consequently, they have not acquired this property. So Ripa is on our side and Angelus also supports us, [p] as does Jason. Ripa cites the glossator also. [q] Now the glossator distinctly remarks that a thing does not belong to the enemy who takes it unless it has been brought within his fortified lines.

Salycetus who is cited makes the same statement: " Notice," he says, " that persons do not belong to the captors, until after they have been taken within the fortified lines of the enemy, and the same thing is true of all other movable property that, before it has been brought within the fortified lines of the enemy, it does not belong 8
to them, but remains under the same ownership as before its capture, for with respect to things the reasoning is the same in this case." Now these golden words concerning property have been at my disposal against my adversaries, who had the hardihood to treat the case of captured persons and captured things separately. [r] For, although in this connection the laws themselves teach the same doctrine concerning the acquisition of ownership in both cases, and concerning postliminium in both cases, still I should scarcely have established my point, if I had not brought to bear these words of Salycetus to that effect.

Now let us mention here our other authorities. [s] The other Angelus, when he finds the statement, property taken from the enemy becomes ours at once, remarks: " Interpret this statement in accordance with that law, which requires the property to be brought within fortified lines." He teaches the same doctrine with reference to postliminium, holding that it is not enough to have escaped from the enemy unless one gets back to his own people, because the law requires the satisfaction of both conditions. Thus the other

Angelus expresses himself. [t] So also Bellus; for what, says he, if the enemy lie hidden in the woods or elsewhere with booty for three or four days while he lacks the power to return to his own people? [u] To the same effect the most learned Molina. He interprets fortified lines as a wall or a camp. He expresses himself even more fully to the effect that it does not cover the case if the captives spend a night with the enemy or are brought into the camp, provided the owners keep up the pursuit, and do not give up their efforts to recover their goods. For in this case they would lose neither the right of ownership nor of possession.

The Spaniards have not lost possession in this case since their goods were not put into the enemy's vessel, but were left in the captured ship, which was towed, or was navigated by the Dutch who were transferred to it. [x] Furthermore, the owner, even when he has been ejected, retains possession through his representative who has not been ejected but is even detained against his wish. And this was the situation in this case where captive Spaniards remained in a captured vessel, for by means of these captive sailors and these agents the owners of the goods
9 retained their property and the right of possession. [y] Nor would they lose possession, even if their representative should give it up. [z] Provided they were themselves detained, they would be regarded at least as dispossessed. But we are rather discussing ownership at present. Besides, Molina points out very pertinently to our maritime case, that even if retention for a night or for an interval of twenty-four hours seems enough to some people, still, if the incident takes place at sea we may not think of the property as acquired by the enemy who takes it until it has been brought to a safe place. And indeed the line of reasoning in the case of maritime affairs, as I have set it forth for this case of ours, is somewhat different. [aa] Finally Ayala also is on our side. Hear what he says: "Still this point must be recognized," he says, "that booty does not become the property of the enemy until the time arrives when it has first been brought within fortified lines." "Up to that time it has not become the enemy's, nor has it ceased to belong to the man who had owned it." [bb] I too have written to this effect in my books on war, and I have not now made the statement for the first time, and forsooth I have asserted it in a word, as an undoubted fact. And so all the authorities are on our side, none on the side of Gama.

Or do the following statements which we quote from Angelus support Gama? [cc] "But if the said booty, though it be not sent back within the fortified lines, be kept in the camp for so long a period, that in all probability he who has lost it must have given up the intention of recovering it, we may understand that he has really lost it. But in deciding how much time ought to elapse, in order that

the said intention may be taken for granted, this whole matter must be left to the decision of the judge, who ought to decide according to the varying practice of places and peoples. Now I have heard some men experienced in arms assert, that with them the practice prevailed, that, if booty were retained in camp by the enemy for a day, it is understood to have become the property of the captors. And the practice is reasonable enough, because, as a rule, booty which has been lost is usually recovered the same day. Furthermore in that lapse of time those who have lost a thing usually confess that they have lost it, so that usually after the expiration of a day the intention to recover seems to be given up."

However, these words of Angelus do not count on Gama's side, because they were applied rather to another topic, to the question whether property which has been recaptured should be returned to the owner or not. Another reason is that the captive Spaniards probably did not give up their intention of freeing themselves and their hope of being set free, since they had to be taken over the seas, with the risks therein involved, past friendly shores, before the eyes of their countrymen. Angelus himself adds to this consideration the fact that a series of days, no matter how long, does not constitute the required interval, if those who have lost their property pursue the plunderers. Then too, it is only a custom that Angelus speaks of, no matter how reasonable it may be. But the law in regular use says that the booty captured must be brought within the fortified lines.

I say also that in the case before us this reasonableness is not established by the best of arguments when it is based on the law which states that wild beasts which have escaped from our custody cease to be ours, for there is a great difference between the loss of one's property and the escape of wild beasts. In their case this would be the easier rule to follow, and liberation and return to the natural state are given preference. Why, does our property cease to be ours, if it passes out of our custody? Angelus says that the case is comparable with that of a thief caught in the act, when the man has been apprehended before he has carried a thing to the place whither he had intended to carry it. But I do not see that our question is parallel. Of course a thief ceases to be a thief caught in the act, after the transfer of the stolen property to its intended place, but shall property cease to be ours after its transfer to a place chosen by the enemy?

In no wise do these words of Angelus stand in our way, and nothing else in this matter opposes our defense, [dd] and the particle " at once " which admits of a lapse of time here and elsewhere does not stand in our way. The article taken becomes at once the prop-

erty of the captor, that is, after the captor has willed to regard it
11 as having become his, [cc] as I have set forth elsewhere. Why should it not be taken so? [ff] Whatever is proposed for the benefit of anyone, carries the implied condition, "if it shall have pleased him." This condition holds also when anything is done by automatic action of the law (*ipso jure*), as we say. [gg] A thing captured becomes the property of the captor "at once," that is, after it has been handed over to the captor's commander. On this point see Socinus, Socinus the Younger, and others. [hh] Ruinus, too, who holds that movable things become at once and automatically the property of those who take and seize them, takes it for granted that they have been shown [to the commander].

[ii] Besides, these very particles of which we are speaking, precise though they are, have their meaning qualified by other laws. But of the law on this point, enough!

Property not yet brought to a place "presumably" safe does not yet belong to the captors, nor has the ownership of it been lost. One must make the same statement of the case when our soldiers have followed the enemy without delay even within his fortified lines, because in these circumstances we do not think that goods have become the property of the captors, since the place is clearly unsafe. But the spoils cannot have actually passed out of the sight of our men, and so we do not regard things as captured which are straightway recovered. Thus Salycetus concludes and I follow him; [kk] and so there should be no question of postliminium here where nothing has been actually acquired by the enemy.

a—l. 5. de capt.

b—l. 166. de V. S.; Bar. l. 51. de leg. 1.; Soc. l. 47. de cond.; Fulg. l. si qui. C. de postul.

c—l. 1. 5. 12. 22. 23. 27. de capt.

d—l. 71. de V. S.

e—Alb. 2. de ar. Ro. 7.

f—Menoch. 1. de re m. 43.; Bud. l. 8. de re mil.; l. 1. §. 4. de vi et vi arm.

g—Gel. 10. c. 26.; Cat. nup. Pel.; Hor. 4. od. 4.; Plau. Ru. ult.; Negus. 2. de pign. 4. n. 41.

h—Saly. l. 12. C. de postl.; item Castr. 1. cons. 445.; Ang. disp. renovata guerra. col. 4.

i—Stra. de navi. p. 2. num. 5.

k—Aret. l. 1. de adqui. poss.

l—Ang. de disp. ren. gu.

m—Rip. l. 1. n. 4. de adqui. poss.

n—l. 27. de mil. test.; l. 5. de jur. imm.; Rip. 2. de leg. 2.

o—Ias. Dec. l. 1. quod qui. ju.

p—Ias. l. 1. de adqui. poss.

q—Gl. l. 12. C. de postl. ubi etiam Salyc.

r—Soc. ju. l. 1. n. 66. de adquir. poss.

s—Aret. §. item ea. Instit. de rer. div.

t—Bell. 3. de ju. be. 2. num. 12.

u—Mol. de ju. et jur. to. 1. tr. 2. disp. 118.

x—Ias. l. 1. §. 4. n. 4. de adq. poss.; Crav. cons. 319. col. 15.

y—Rip. l. 1. n. 74. de adq. poss.

z—l. 1. §. pen ubi. An. de vi et vi ar.; Imo. l. 29. de adqu. poss.; Alb. l. 19. ex qui. ca. ma.; Alex. Bar. l. 3. de lib. et posth.; Bal. l. 11. num. 66. C. de his, qui ac non po.

aa—Aya. 1. de ju. be. 5.
bb—Alb. 2. de ju. be. 16.
cc—Ang. d. disp. reno. guerr.
dd—Imo. Soc. l. 1. §. 1. de V. O.; Ias. l. 105. eo.; Arch. c. constat. 1. q. 1.; Rui. 4. cons. 43.; Alb. disp. Mach. 3.
ee—Alb. 3. de ju. bel. 9.
ff—Menoch. con. 20.; Ias. l. 2. n. 24. C. de bon. poss. co. tab.
gg—Soc. alii l. 1. de adqu. poss.; Aret. d. §. item ea.; Saly. l. 12. n. 6. C. de postl.
hh—Rui. 5. cons. 31.
ii—Castr. l. 104. de V. O.
kk—Soc. ju. l. 1. n. 65. de adq. poss.

CHAPTER III

On the Judgment Passed by Soldiers and on the Varying Practice in the Matter of Things Captured by the Enemy

[a] Ripa does not accept the decision made by soldiers concerning things captured from the enemy, although he gives it at the end of his discussion to the following effect: "Still our soldiers say that captured property is theirs, if they have kept it with them for a night." He supports a different opinion held by Angelus, offering a better legal principle to establish it. [b] Neither is the opinion of the doctor given, although at the end he makes the statement: "Some
12 others hold," or "according to some writers," nor is it probable that Ripa thought the decision of the soldiers a just one even in their own case. Even in the decision of the soldiers, pray what does "with them" (*apud se*) mean? Perhaps it means the same as within their fortified lines, [c] as the expression runs, "a son brought up with the enemy," "to die with the enemy," "to be with them." And so the ruling of the soldiers is in harmony with the law, but it is at variance with those who would require a period of three days, and with those who hold that he who had owned the captured goods must have turned to other matters. This is the English law, and the law of Castile, which in like manner make acquisition depend on retention in the territory of the enemy for a night, or on a delay of twenty-four hours.

And it is natural for law to harmonize with law. Still soldiers themselves do not think that goods have been acquired, provided they have merely been brought within fortified lines, unless they have also been kept for a night, and on this point they are at variance with the law, which makes a thing the property of the captor as soon as it has been brought within fortified lines. Therefore the article recovered before nightfall is again acquired by him who recovers it, as Bellus explains. Unless perchance in this case of quick recovery you would indorse the view of the soldiers, [d] because a thing which has been recovered at once we should not consider captured. [e] Alciatus says that "a thing which has not yet been held in the territory of the enemy for a night may be thought of as recovered at once, and that the military prefects usually follow this principle." Now this was the doctrine of Salycetus, which I have reported at the end of the last chapter.

[f] But with reference to this ruling of the soldiers, listen to
Angelus whose self-same words, all of them, and this often happens,
are the words of Baldus on the point at issue: "These troopers say
that booty is never said to have become theirs completely until after
it has been under their control for a night. For when they flee with
booty, it is not under their protection until they are in a *safe* place,
and they are speaking the truth. Consequently when they have been 13
led back within their fortified lines, even if a night has not elapsed,
still they have become owners of the booty." In this way these
writers, out of the reasoning of the soldiers, bring the doctrine of
these soldiers into accordance with the meaning of the law.

Let us also bear the fact in mind that there are two different questions: one, when we may regard captured goods as the property of the enemy; the other, when property recaptured from the enemy need not be restored to the former owner. As Ayala writes, the latter question has involved practically all the commentators in many and manifold explanations, but the law in the first question is quite clear, and therefore we shall not make a logical inference from one question to the other.

A thing may be acquired by the enemy, and yet, if it be recovered, may still be the property of the former owner, like property which gains postliminium, [g] for such property acquired by the enemy, and thus lost to the former owners reverts to them if it is recovered. Why, were not our princes and soldiers who recover the property retained both to protect our possessions and to support us? On the other hand, the property may not have been acquired by the enemy and yet when recovered, cannot be restored to the former owner, but may pass to him who recovers it, naturally, in order that everybody may be encouraged to fight, and that valor may get its reward. Another reason for this principle is that the former owner may not receive that, the reverse of which he would be unwilling to suffer in the reverse circumstances, namely, the expenses and losses which the other would have experienced in recovering his property—property which he himself would not have recovered. [h] These principles others discuss in this connection, and I have stated them elsewhere. So these two questions are different. [i] Others also make the same distinction between them.

And yet if you do not treat them separately you may even reach
this conclusion that neither the decision of the soldiers nor any other
law or practice is at variance with the law, except perhaps in this
respect, that other practices call for some delay, and would not be
satisfied by the conveyance of goods within fortified lines, as I have
said. Every case without exception calls for the conveyance within.
So too Joannes Andreae in dealing with the question of goods brought 14

within the enemy's district raises that other question which concerns recovered property. Neither Joannes Andreae nor the question of recovered property may be urged against me when I say that property does not belong to an enemy who captures it until it has been brought within his fortified lines. And you may observe that the principles of this chapter and the preceding chapter are valid in the case of captured, not of surrendered goods. [k] The decision in the case of surrendered property would be different.

a—Rip. l. 1. n. 4. de adquir. poss.
b—Imo. l. 74. §. 1. ad Treb.; l. 134. n. 4. de V. O.; Ias. l. a divo Pio.
c—l. 9. l. 12. de capt.; l. ult. de off. pr. vi.; l. 2. de adq. rer. dom.
d—Ang. disp. renovata guerra. col. 3.
e—Alc. l. 1. de adq. poss.
f—Ang. Bal. l. 12. C. de postl.
g—Navar. con. 2. tit. 36. lib. 5.; Mol. de ju. et ju. to. 1. tr. 2. disp. 118.; Plat. Inst. de rer. div.; Ias. l. 9. de leg. 1.; Covar. reg. peccatum. p. 2. §. 11.
h—Io. An. Spec. de ra.; Alb. 3. de ju. bel. 17.
i—Rip. l. 1. de adq. poss. n. 4. 5.
k—Ang. d. disp. renovata.; Salyc. I. 12, C. de postlim.

CHAPTER IV

That Property Sure to Be Taken Is Not Held As Taken and Acquired by the Enemy

Yet if property taken, but not brought within fortified lines, is regarded as not taken, and if we do not think of it as acquired by the enemy, [a] why is it that Cephalus expresses the opinion that things not captured but to be regarded as sure of capture seem to be the property of the enemy. "I think there is no doubt," he says, "that things captured by the enemy become at once the property of those who have *first* captured them. But the whole difficulty seems to lie in the way in which the words 'to capture' are taken, and, therefore, in deciding when we may regard the thing as captured in such a way that it becomes the property of the captor. But I think that a thing is called captured when it cannot escape capture." Consequently, he concludes in the case before him that the pirates put to flight by the Maltese triremes, and so hard pressed withal that they were bound to fall into the hands of the Maltese, inasmuch as they were deprived of all hope of escape, were cast on the island of Corsica, and taken by the Corsicans, ought to be turned over to the Maltese, or that at least the Corsicans are held for damages and recompense, since it was they who kept the Maltese from attaining the object of their efforts and their reward.

[b] Alciatus also holds the same view in the case of wild beasts
which have no chance to escape. Ludovicus Molina agrees. He 15
goes into the matter more fully, to the effect that, although ownership and possession are acquired by the captor, when the wounds inflicted by another person are not enough to lead to capture, still, if those wounds should make it possible for the beasts to be captured by another, undoubtedly the man inflicting the wounds would have a claim according to the character of the given case, and would have some profit himself from the captured animals and some claim upon them. [c] I have replied to this opinion of Cephalus in the books "Concerning Roman Arms," and there I have elaborated the principle and developed it more fully. At that time I declared unacceptable the opinion of Trebatius, that a wild beast about to be captured is regarded as captured,[d] and others follow me here. [e] The principle embodied in the different rule once accepted would not stand in the way since a little thing could intervene to prevent cap-

ture. [f] And latent power can have the same effect as actual performance. But I have also replied to Cephalus in the aforesaid books and I have refuted this view of his, I think.

At this point I add that the question about pirates raised by Cephalus ought to be considered different from our question about legal enemies. The practice, too, in the case of wounded wild beasts, a practice contrary to law, ought not to be extended to enemies, who, let us suppose, have beached their ships on the shore of Corsica, as these pirates did. To pirates and wild beasts no territory offers safety. [g] Pirates are the enemies of all men and are attacked by all men with impunity, etc. Similarly the hunting of wild beasts is unrestricted. Therefore, in the case of the pirates, we may say that they could not have escaped, since they are always subject to capture everywhere. But the same statement may not be made of enemies who are not everywhere subject to capture, [for instance,] not with a common friend. The Spaniards are not subject to capture by the Dutch here in Great Britain, in France, in any other part of Christendom. Consequently the Spaniards, even if captured, could escape in many ways. [h] Could captives be captured? [i] But when the law says that a wild beast, whether wounded by us, or a captive escaping
16 from our custody, but still within our view and not hard to follow up, has not recovered his natural liberty, it does not, therefore, also say that it remains the property of the man who captured it. But even if the creature did still belong to the hunter, provided it was on the point of being taken without difficulty, it does not follow that a creature on the point of being taken without difficulty is the same as one taken. Undoubtedly it is always easier to keep a thing than to get it.

Then this question of difficult pursuit must be examined in the light of many a different hypothesis, but the examination will not be furthered by supposing, as a certain solicitor absurdly proposed to me, the recaptured Spanish ship put back in the place where it was captured. Why, even in the case of a wild beast this practice is not followed. [k] Nor is it followed in the case where another law says that I have not lost possession as soon as another person, whom I will easily drive out, has entered my field with the intention of taking possession. Does not the law, taking into consideration the ease of expulsion, order judgment given in accordance with the escorting into the field, even in the present circumstances?

[l] Hotomannus calls barbaric, though borrowed from the customs of the Romans, the similar practice which the Germans applied in the case of claims, while the Romans symbolized it by the power of the rod of manumission and the joint laying on of hands.

I cite another law: [m] " A boar falls into a snare which you had

set in hunting. While he was fast in it, I removed him and took him away. I do not seem to have taken your boar away, do I? And if I should have loosed him and let him go into the woods, in that case would he have ceased to be yours, or would he continue to be yours? Let us see whether he was fast in the snare so that he could not free himself by his own efforts, or whether he would have freed himself by a longer struggle. He has become mine if he has come into my power, but if you had let him go back to his natural wild state, in consequence of that fact he would have ceased to be mine." Furthermore, I observe that what has not "come into" my power, has not been acquired by me, even if it has been captured. It is not mine unless it is captured by my hands, Bartolus and the glossators in common remark in that connection, although, writes 17
Albericus, in the matter of usage in the country the views of Martinus and Hugolinus are followed who actually think the boar mine as soon as he is unable to free himself. Now, with reference to usage, although this is said to be the practice in hunting, still it does not determine the law in war.

A person who is on the point of being captured is not regarded as captured, and he who has been merely captured will not be thought of as secured and brought under the right of ownership of him who makes the capture. [n] Customs deal with an actual situation, and do not, therefore, admit extension in the matter of place, persons, or situations. [o] Therefore, the usage must be established for that kind of a case which comes under discussion. [p] Besides, to show that a usage exists involves very great difficulty, [q] and there has been a vigorous dispute on the point whether we ought to trust a doctor who testifies concerning a usage, indeed whether we ought to trust several who unite in testifying about it. Their opinions do not serve to establish the usage beyond their own time and their own district. These points I noted on this topic and on the other topic about the decision of the soldiers, which was taken up in the preceding chapter. Even in the case discussed by Cephalus, those pirates had been captured, and the question arose, by whom we should say they had been captured *first*.

a—Ceph. Cons. 136.
b—Alc. l. 1. n. 53. de adq. poss.; Molin. de ju. disp. 42.
c—Alb. 1. de ar. Rom. 7. et lib. 2. c. 7.
d—Alc. 11. Parc. 2.; Bar. l. 5. de adq. rer. dom.
e—Alc. l. 1. n. 53. de adq. poss.
f—Decia. 2. cons. 64. n. 40. 41.
g—Stra. de nau. p. 3.; Alb. 1. de ju. be. 4. et lib. 3. cap. 23.
h—Virg. Aen. 7.
i—l. 3. 5. de adq. rer. dom.
k—l. 18. de adq. poss.
l—Hotom. 3. obs. 15.

r—l. [illegible] de [illegible] rer. dom.

s.—Bal. 1. cons. [illegible]; Decia. 2. cons. [illegible] et lib. 3. cons. 19.; Ruin. 1. capite 19.; Schurp. 3. cons. [illegible]; Crav. cons. [illegible]; Ias. l. de quibus: ubi add.

[illegible]—Crav. cons. [illegible]; Menoch. 54.

p—Bald. c. ult. de consuet.; Fulg. cons. 6.; Crav. 183. 886.

[illegible]—[illegible] 1. cons. [illegible]; Vin. [illegible] Doctori.; Myns. 6. obs. 68.; Ias. l. de quib. add. no.; Ceph. cons. 299.; Menoch. 34. 54. 911.; Stra. de deco. p. 5.

CHAPTER V 18

Whether It Is Lawful to Capture the Enemy in the Territory of Another

It seems lawful to capture an enemy in the territory of another. [a] Without doubt it may be lawful to enter another's field for the purpose of hunting wild beasts. Therefore, it may also be lawful to enter another's territory for the purpose of hunting the enemy, [b] for war is a hunt, [c] and a territory is nothing else than a domain. Even if a man has entered a field against the will of the owner he takes possession of his spoils. Suppose that the pursuit of the enemy who is on the point of capture has begun in a territory where capture is allowable, but that he has continued his flight and been taken in the territory of another? [d] In the case of an offender who has fled in this way and been captured, the legality of the capture is maintained by Mynsingerus in the conclusions of the Imperial Chancery on the authority of Angelus and others, [e] and this assertion may be generalized in accordance with the rule that it is the lawful beginning, not the unlawful end, that must be taken into consideration.

But this conclusion is false in the case of an enemy. [f] This I have shown in my books on war. The territory of another insures safety, and when territory changes, control changes, etc. Further, Baldus, Romanus, Alexander, Jason, and Cagnolus teach that an offender who is taken in another's territory, [g] must be set free, even if his flight began in territory where capture was allowable, inasmuch as at the end the situation is different. [h] Cephalus says that even a captive taken in the territory of an owner of lower rank may lawfully be recovered from the territory of an owner of higher rank, and that too, because the beginning of the pursuit there was lawful. And to this effect he cites other doctors as well as Angelus whom Mynsingerus mentions in support of his divergent opinion. But consider further that it is of the disturber of the public peace that Mynsingerus is speaking. Him it is lawful to take in another's 19
territory, and in this case Cephalus too agrees with him. But beyond that case the remarks of Mynsingerus do not go, as has been noted in regard to them. [i] This is what they say on that point, and other German writers who express similar views say that he violates another's territory who after beginning his pursuit lawfully makes a capture in another's territory. They say that he may be held for

lèse-majesté, because of the public violence involved. Then, too, the remarks of Mynsingerus have to do with different territories, it is true, but still with territories united in one whole, namely, the German Empire. It is reckoned as one territory, so far as the Emperor himself is concerned, [k] as the doctors remark in similar cases.

Now Cephalus replies in various ways to the objection that the starting-point ought to be considered, and that according to all authorities the starting-point is lawful when we find the same authority in control throughout, so that, if the beginning and the end are in the same territory, etc. [l] An offender, for example, if he flees into a church is safe, as at least the more correct and commonly accepted opinion goes, the opinion sanctioned by usage and confirmed quite recently in important cases. Covarruvias states that he does not see the reasoning by which the opposite view can be defended. Therefore, if he does not draw that inference concerning the lawful starting-point in the case of the church, he will be less inclined to draw it in the case of a territory, [m] for the church is within the territory of a lay magistrate. Therefore, the distinctive right and privilege of a church is that immunity which I have mentioned.

[n] I know that there are some who teach that whether a place is exempt or outside a territory makes no difference, but I know that at the same time it is said that this doctrine involves great peril; nay, that it is false. [o] To be outside a territory is to be entirely in foreign parts; to be exempt is not the same. Accordingly, the reply has been given that while common consent may support the judge who grants an exemption, it is not true that foreign territory may be violated, and the reason given is that a thing easily resumes its natural character. So a church may easily resume its original non-exempt character. [p] Besides, this privilege of the church is prejudicial and opposed to the public interest, when that interest demands the apprehension and punishment of the guilty, and when it is simply a question of liberating a criminal in a church. That privilege is always opposed to the theory of the common law. But in the case of an enemy and the territory of another, the common law, making distinction of territories, assumes a favorable aspect; [q] it is more compelling and harder to break. Furthermore, in this case the question concerns one who is unfortunate and a freeman; in the case of the church, it often concerns a man who is convicted and sentenced to punishment. Therefore, if that doctrine holds in the case of the church, in the case of a territory it is the more valid; the situation is entirely the same.

Thus I have replied also to the arguments on the other side which I have mentioned above. [r] To that first argument, with reference to another's field, Socinus replies that an interdict on hunting

by the owner of a field does not have to do with the security afforded by the state, as a change of territory does. I too have answered this point in the chapter immediately preceding. [s] But what do we say to the principle of law which I too have laid down elsewhere, that anybody and everybody is bound to hand over to the victor the property and the person of the vanquished? It is quite evident under this principle that the territory of another ought not to be a place of succor to the vanquished. But in the same passage my reply has been that this doctrine may be affirmed in the case of a complete victory, not in the case of a small success. And here it does not follow that, if it is lawful for a victor to try to secure the spoils, it may also be lawful *per se* for him to take them, or even that he who rules a territory may always be required to turn them over to the victor.

a—Bar. Ang. Cast. l. 16. de serv. rust. praed.
b—Xenoph. 2. Cyrop.; Arist. 1. Polit.
c—Bar. l. 48. de fur.; Bal. l. 10. C. eod.
d—Myns. 2. obs. 28.
e—l. quod ait. ubi Bart. de adult.
f—Alb. 2. de ju. be. 22.
g—Cagnol. rub. de orig. jur.
h—Ceph. con. 229.
i—Gail. 1. de pa. pu. 16.; Wur. 1. obser. 9.
k—Dec. l. ult. de jurisd.
l—Clar. §. fi. q. 30.; Decia. 6. pr. 28.; Cov. 2. var. 20.
m—Schar. 2. con. 21.; Decia. 6. pr. 30.
n—Fely. c. ult. de rescript.; Ias. l. ult. de jurisdict.
o—Panor. q. 7. n. 3. 6.; Cagnol. l. actus. num. 69.
p—Decia. 6. pr. 29.; Conu. d. 20.
q—Aret. l. 138. de V. O.; Anch. c. 1. n. 297. de consti.; Fely. c. 19. n. 3. fi. de accusat.
r—Soc. l. 1. de adq. pos. et ibid. Soc. ju. n. 69.
s—Alb. 1. de ju. be. 17. et lib. 3. c. 5.

21 ## CHAPTER VI

Whether It Is Lawful to Conduct an Enemy Captive through Another's Territory

[a] All writers agree that it is not unlawful to transport grain through a place, from which it is still unlawful to export it, so that it may be regarded also as lawful to conduct property taken from the enemy and to conduct the enemy captive through that territory, from which still it might not be lawful to take them. [b] Then it is an undoubted fact, says Decianus, that, if a captive be led to prison through the graveyard of a church, he will not be safe on that account, but may be taken from there. He states too that this is the opinion of Archidiaconus, of Oldradus, and of many others, that it is the more correct doctrine, a doctrine to be accepted, and one observed in practice. [c] Other authors too may be added to the authorities cited by Decianus, viz., Albericus, Caepolla, and others.

Caepolla literally says that a criminal who has been taken in a territory where seizure is permitted may be conducted through another's territory and not be set free there. [d] The mere passage through does not mean protection, says Felynus in a similar discussion, where a man is forbidden to be in a church without being forbidden to pass through the church, because otherwise he would be safe there.

Again, if in another's territory it is not lawful to seize what belongs to the enemy, neither should what has been seized elsewhere be released there. If it does not suffer capture there, neither may it become free there. And *vice versa,* the same doctrine would hold, and the law is consistent in all cases.

Again, is not traveling unrestricted, and traveling by sea (on this point the issue arises in my case), is it not especially free? Besides, the sea and seashore are the common property of everybody —[e] the sea, most clearly recognized as common property, says Jason.
22 Now, the Spanish Ambassador opposes the action of the Dutch in taking property captured from their Spanish enemies by this route, through the British sea and along these shores, and he asks the magistrate here that all the property be stopped and be released.

[f] Is it proper for the king or for our magistrate to take from their friends, the Dutch, a gain which is lawful, or due them, or

secured by them, in order that aid may be rendered to the Spaniards, who are likewise their friends? Ambrose, the theologian and jurisconsult, says "no" on this point, because if one cannot be aided without injuring another, it is better, not to help the one, than to vex the other. [g] There is a common saying that one altar ought not to be uncovered in order to cover another.

I also pondered the followings words: [h] "If one has the right to bury his dead, he is not [to be] prevented from exercising it; but he is evidently prevented from exercising the right, if he be prevented from carrying the body to the place of burial, or be kept off the road." More fully: [i] "It is ordered that corpses be not detained or molested or hindered from being transported through the territories belonging to towns." And more fully still: "That they have deserved no punishment, who have carried through villages or a town the body of a man who has died on a journey, although such a step ought not to be taken without the permission of those who have the right to give that permission." It is then an offense which carries no penalty, [k] as the gloss to the passage adds. And so it may not be lawful for the Dutch to cross here with the booty in question without the permission of our king, but if they should try to cross without this permission, they would not suffer punishment, certainly not this exceedingly severe punishment of losing the booty. At least the right should be granted to them which is given even to thieves who betake themselves with stolen property into another territory, [l] for thieves in such a case are expelled. With this limitation, therefore, let the punishment stand.

These are the considerations which I myself brought forward against the side for which I am the advocate, but still they presented no real difficulty, and I defended my side in this way: These captured possessions have not yet been made the property of the enemy, and therefore here in the territory of the king, who is the friend of both parties, no force should be brought to bear on the things captured. Now no one would deny that force is brought to bear on the captives and their captured property, if these captives with their 23
property be taken from here against their will. For force is brought to bear not only at the time when a person and when a thing is seized by force, but then also when they are taken along by force. [m] Force is said to be used in both cases, both when a thing is seized and when it is detained, as the commonly accepted opinion goes. [n] Thus theft often involves a continued act of stealing; thus there is often a continuation of theft; thus we speak of a continuous stealing on the part of a thief, even though the thing has been taken but once. [o] And so Barbatia says that a thief who flees with stolen property to a church is said to commit a new theft there because of the newly occurring act of stealing, and, therefore, he may be even taken from

there with impunity, which would be correct too in the light of what has just been said, even though Clarus may not regard it as correct. Consequently he does not accept the view of Bartolus, who says [p] that a thief found here with stolen property taken in theft in another place may be punished even here, for, just as with a change of owners added to the continuous stealing a new action for theft is taken to inflict punishment upon the guilty party, so with a change of territory and jurisdiction a new accusation would be made to secure the protection of the state.

That the opinion of Bartolus is accepted by the assessors as useful to the commonwealth and in accordance with the Gospel; that it is put in practice throughout the world; that it has led to the hanging of thousands of men; that it is approved by the council of Naples; that it is a common doctrine; and other considerations have been reported in Clarus and corroborated in the additions made to Clarus, [q] whatever many, without cause, against the public weal and the commonly accepted view, may think and say to the contrary.

Still it is not necessary here to argue about this view, for all the authorities think this; that, let the situation regarding punishment to be inflicted on a thief be what it may in a new territory, still [r] if in the new territory the act continues, there would also be an offense committed against the new jurisdiction. This present ques-
24 tion has to do with a case, where, although the original act is past and gone, the action still continues, because by this route through the English Sea and through a new jurisdiction force is being continued, force, which it was lawful to begin elsewhere, is exercised here unlawfully. He holds by force who continues in possession by the use of force as well as he who has gained possession by the use of force.[r] The Dutch should give up all use of force here and the goods of the Spaniards which are still free should not be taken away from them here by force.

[s] Even in the discussion mentioned above those who oppose Bartolus admit that a thief should be sent back to the place where the offense was committed; further, that the property should be taken from him and restored to the owner. To these opinions we also give assent here. The reasoning of these men too makes it appear that a strange territory does not protect thefts, etc. [t] Castrensis well says that a man who has been robbed would have ground for action against the owner of the place which received the thief. [u] Now I cite Imola literally, who has replied to this effect and says it is "certain" that it is not lawful to conduct a captive through another's territory, and indeed this conclusion of his is general, although the particular case was before him of one who had been unjustly seized and was besides a native of the territory. [x] And Bellus too

takes Imola in this general sense, for on his authority he writes that the territory of a third party ought to be safe even for one merely passing through it. They who have conducted captives through another's territory commit an offense, and are therefore required to give them up or to give satisfaction otherwise, says Imola. And therefore in the case now before us, when the property and the men are here, they should be preserved in their liberty, say I, for, if men transported by this route were to be demanded rightfully, it will be much more equitable to keep them back. And this dictum of Imola and Bellus found in the very terms covering the question should be heeded, not that given explicitly by Caepolla, concerning the criminal, who will be led off with greater ease and justice.

Further, the reason why Caepolla makes that statement is that
he thinks the status of a church and of a territory are the same—a 25
thing which is false, as I have shown in the preceding chapter. False too is the claim of Decianus that the Church has no rights here, as I shall make clear in the following chapter.

The only thing true is that which we noted in the matter of grain. But that question is not like the one now before us, since it does not concern a city, if grain, which has not been grown in its territory or has not otherwise become the property of the city, be carried through it. [y] And this reason is offered by Jason and by another writer to show why it is lawful to take it through a city. He who passes through a city cannot be said to take from the city—a thing which the statute forbids. [z] To pass through is to enter and to go out.

Yet it does concern a territory that there be no one but the ruler of the territory to inspire fear in it. It is of importance to this ruler not to see another inspiring fear in anyone in his territory. It is of importance that no captives whatever be taken, held, or dragged off except by order of the ruler of the territory, for these acts derive from jurisdiction, and jurisdiction in the territory of our king does not belong to any foreigner, [aa] so that the crime of keeping a private prison or *lèse-majesté* is committed when another holds captives in territory not his own. This is the claim in the case before us, in which sovereignty and jurisdiction are being asserted.

Besides, profit is not being taken from the Dutch, nor favor shown the Spaniards. What I have said of the transportation of a dead body involves a different principle. In that instance no wrong is done to the territories concerned; no force is applied to anyone, and the cause of religion is most beneficent. What! I pray, shall this deed of the Dutch escape punishment because that involved in the transport of a dead body is not punished? Shall this use of force by the Dutch fail of check, I pray you, because that act which I men-

tioned of transporting a dead body is not restrained? Nay, even that 26 act might be hindered, since it is forbidden. This argument of theirs does not apply here. That last argument about thieves is even less valid. This method of treating thieves which is said to have been adopted once at Milan has been discredited, and it is inconclusive, for what inference therefrom, as to the question before us, can be drawn to show that the Dutch may even employ force in dragging captives and booty along with them through the territory of another, albeit a friendly and allied king?

a—Ias. l. 43. de leg. 1.; Clar. §. fi. q. 82.; Menoch. cons. 901.; Stra. 4. de merca. num. 49.
b—Decia. 6. pr. 28.
c—Alb. rub. C. de his qui ad Eccl.; Caepol. l. 17. de aedil. ed.; Leomin. cons. 56.; Ever. Lo. à vir. fi.
d—Felyn. c. 2. de except. num. 5.
e—Ias. l. 1. n. 11. C. de su. tri.
f—Ambr. 3. de off. 9.
g—Corn. 4. cons. 21. num. 2.
h—l. 1. §. 1. de mort. infer.
i—l. 3. §. 4. de sepul. viol.
k—item in l. 12. de usufr. leg.
l—Clar. §. fi. q. 38. n. 16. fi.
m—gl. C. ubi de poss. ag. op.; Ang. cons. 363. in fi.
n—l. 6. 9. 17. 50. 67. de fur.; Rui. 4. cons. 82; Mantu. l. eos. C. de fur.
o—Barb. 4. cons. 33.
p—Bart. l. 48. de fur. etc.
q—Mars. l. ult. de jurisdict.; Soarez. recept. Sent.
r—Bald. c. 1. §. 2. de pa. in fi.; Fulg. l. si abducta. C. de fur.
s—Covar. 2. var. 20. et pract. 11.
t—Castr. 1. cons. 423. num. 3.
u—Imo. cons. 51.
x—Bel. 2. de be. 18. fi.
y—Alex. 4. cons. 86.
z—Fed. de Sen. cons. 127. et 173.; Bal. l. 18. §. 2. de sti. ser.
aa—Clar. §. fin. q. 68.; Decia. 7. pr. 10.

CHAPTER VII

The Opinion of Archidiaconus with Reference to a Captive Conducted through a Church Is Examined

Against our defense given in the last chapter the advocates of our opponent urged the opinion of Archidiaconus, which I have set down there at the beginning and, as my adversaries have not done, I have also supported his opinion by other evidence in the way of proofs and of writers who assent. But first I have replied that the common opinion is opposed to this view of Archidiaconus, [a] as, for instance, Remigius states the common theory in his tractate "On the Immunity of Churches." [b] Similarly Clarus says: "I say quite confidently that if a man under sentence, while being taken to punishment, passes through a church or a cemetery he may enjoy the immunity of the church, nor may he be taken from there by force; and this is the common doctrine." This doctrine too Johannes of Monte-Sperello held, [c] whom Bartholomaeus Socinus cites for me, [d] and whom Cornaeus also always mentions as distinguished, as a man of taste and of very superior qualities, as eminent, as most upright, [e] his teacher, a man of most blameless judgment. Socinus reports that 27
the same view is held by the elder Marianus [f] whom Alexander calls very distinguished and famous. And Bartholomaeus, himself a very eminent and great jurisconsult, holds the same view. [g] Just as even his own rival, Decius, names him, not to mention the testimony of others, and the testimony of Mantua, who calls Socinus, whom we have mentioned, easily the leader among jurists. Even Mantua holds this opinion, whom Decianus styles eminent and very illustrious, and Decianus cites Mantua in his support. This position Johannes Vischius, "On the Immunity of Churches," takes, not "seems to take," as Decianus puts it, [h] and here in passing I may say that opinions of learned men in their treatises are preferred to what is reported in their other writings. [i] Gonzalus Suarezius holds this view in his treatise "On Ecclesiastical Usage," and he mentions another writer also, and from Remigius he cites the common opinion, as Clarus does too.

So we see it is the common view—a view which is held by nine doctors, [k] although seven are enough. But I will add also Romanus, Jason, and other writers, with the consent of Decianus. [l] This is the view which, as Chassaneus has noticed, is followed by the people of

Poitiers and which, as he also says, should be followed. Gigas has noticed that it is followed at Venice, as Decianus himself relates.

Now, in answer to Archidiaconus, Socinus replies that he does not seem to stand on sure ground, if his position be carefully examined. This is true, [m] for Archidiaconus says: "If a person be seized by a bailiff outside of a graveyard or a church, led through a church, and taken therefrom by force, the immunity of the church does not seem to be violated. See the writings of Archidiaconus on *Code, De aedificiis privatis,* l. *si quis,*[1] in the argument against the first point, qu. *si quis contu.,* and on can. *definivit,*[2] at the beginning, where you notice his hesitating words, "he seems," and in that connection you will notice that only an argument is given,
28 although it is a very good one. Another and an opposite view is given later on, and it is supported by a two-fold argument from the canon law itself, [n] but we rather accept the opinion of the author which is given last, [o] even when he does not support it at all.

But if Archidiaconus, upon whom all the rest depend, either holds the opposite view or lays down no principle, of what value will the names of the rest be? [p] A doctor, my friend, Oddus, states that the names of those who depended on a passage in Baldus are of no weight. "In reply," he says, "it is enough to weigh carefully the dictum of Baldus, for all of them depend upon it entirely. Now, Baldus lays down no principle, etc." [q] So also another doctor, my friend, Clemens Nonius, in opposing Alexander and Corneus, says that a man does not seem to make a statement who depends upon the statement of another, if that other really makes no statement. [r] In the same way Menochius argues against several opponents, that reliance ought not to be placed on the authority of those who have spoken without due consideration in following Speculator, since the latter was talking, not about law, but about usage. [s] He mentions similar cases elsewhere. [t] "We take it for granted that the man who refers vaguely to the teachings of others holds opinions of the same character as are the opinions of those who are cited."

[u] It is a well-known and much-used principle that whatever stands in the original is also implied in full in the citation. [x] It is a well-recognized principle that the dicta of learned men are interpreted in accordance with the laws and authorities which they have cited, even if their words seem to say something else. [y] They would seem to have gone astray and to make no definitive statement who report what is not found in the original. [z] Their authority is worth nothing. At least we can say here with Socinus that all these followers
29 of Archidiaconus reach no fixed conclusion, for certainly Archidiaconus himself reaches none. [aa] Alciatus writes that the man who merely states the pros and cons reaches no fixed conclusion, and in the

[1] [*Code,* 8, 10, 6.] [2] [*Decr.,* 2, 17, 4, 25.]

passage before us Archidiaconus discourses in this fashion. Or if the man who speaks in this way does state any conclusion, he does so, as I have said, in his last utterance. [bb] Panormitanus makes the same observation in discussing an opinion of Innocent, even when Innocent stated a second view in these words: "But others give a contrary opinion." [cc] However, these words do not usually convey the view of the man who speaks, even if they stand at the end of his discussion. But this would be the case, when an earlier view was in the main supported. Other things being equal, the last statement is to be accepted. [dd] Upon another remark made by Baldus, Rolandus put it cleverly that Baldus does not seem to support this view; on the other hand, Rolandus reports at the end of his argument that the doctors hold the same view, indeed hold this very opinion which he thus gives at the end. Rolandus also says that reliance ought not to be put on certain remarks of Jason, who depends on the dictum of another person, since the other person expressly holds the opposite view. [ee] These cases are undoubtedly very frequent. Of a certain gloss, Felynus writes: [ff] "The whole world cites it; yet it rather proves the opposite point, because it directly establishes the contrary view, and holds fast to this contrary view." Shall we not say the same thing of the passage of Archidiaconus before us? "To state frankly what I think," says Oddus, "I have been surprised at the doctors who cite Baldus to this effect, etc." [gg] And in another case, Menochius, in opposing Decius, Parisius, Socinus, Vasquinus, and Covarruvias, says: "It is surely remarkable that these famous expounders of the law have arrived at this conclusion so rashly, without weighing properly the passages cited by them." And in this way Menochius shows that their authorities are not pertinent. And so it stands with Archidiaconus and his whole school.

Furthermore, Oldradus does not seem, if he be carefully studied, to make that statement, and this Socinus likewise maintains, [hh] for Oldradus says: "What of the man who has been seized and is being led through a church; suppose that he is dragged out (note Arch., 17, qu. 4, *sicut antiquitus* [1])." And similarly he expresses himself in a supplementary note to the *consilium*, as it were heedlessly, and not with regard to the case covered by the *consilium*. [ii] A statement which is made carelessly is not the real view of a doctor. These statements in fact apply also to Albericus, Caepolla, and to other writers, the more so to Decianus, since he wrote in this fashion in that handbook of his, a work brought out after his death, unrevised and incomplete, a book in which he does not mention Clarus and the other writers I have cited as being opposed to the view of Archidiaconus. [kk] Clarus is a man of great discernment; he is accurate in making quotations, and a doctor of sound learning.

[1] [Archidiaconus, on *Decr.*, 2, 17, 4, 6.]

But my adversaries have not even considered carefully whether the law upon which their view rests establishes it. [ll] It is not lawful to carry marbles and other decorations from buildings out of the city into the country, but it is lawful to take them from one part of the city to another, and through the middle of the city. The law states this. Now Archidiaconus gives a very good argument that it may also be lawful to take an accused person who is under arrest through a church. However, it is not such a very good argument after all, because the law merely forbids the defacing of cities. But a city is in no wise defaced if the works of art mentioned above are taken through it, unless, perchance, they are of the sort which Pliny mentions in his "Panegyric,"[1] when he says that "the roofs in the city are shaken by the transporting of huge blocks of stone; the houses are endangered and the temples totter."

[mm] Now we grant immunity to a church because of our reverence for it. [nn] This immunity is violated, if force is brought to bear upon anyone there, within its purview. And this force is used upon the man who is dragged through a church, and who appeals to the church for help with eye and voice, though he cannot with his hands. Salycetus, who in commenting on this law writes that what would not otherwise be permitted, is permitted if it occurs merely in transit, links with other questions the one concerning grain where his argument would have a more direct bearing. On this point I have expressed myself
31 in the preceding chapter.

However, here is an argument which leads to the opposite conclusion. The church does not receive the man free nor does it put restraint upon him, because the authority which is effective outside an inviolable place is not recognized within it. [oo] There bonds confine the hands of the very man who was leading the other in bonds. With what purpose, pray, except that he who was bound may go free?

Another argument, too, of Decianus is weak, that the church protects those who fly to her for refuge and that the man who is being led through a church does not fly to her for refuge. Now I say that it is not the mere flight of a man to a place of refuge that brings security, but the sanctity of the place invoked on the spot. Such a man, says Covarruvias, is really not dragged out by force, but is being led through the temple after having been arrested outside. But he is led by force, say I, and consequently is dragged out. [pp] It is enough for him to cry out in the church. In general, the doctrine is that one may not be taken out.

But if the statement takes cognizance only of those who flee for refuge, that arises from the fact that we are commonly wont to

[1] [51, 1.]

inquire and take action concerning such cases, while the case of men under escort is very rare. Expressions used to cover the commoner occurrences indeed do not limit the application of the law, as in a similar case, the glossator observes in a note to the first law of this title. [qq] This principle is everywhere applicable. Bartolus, too, understands the second law in this way: "Those who are in churches cannot be taken out against their will," and he does not distinguish how they got there. Suppose the case of those who do not flee there, but are there, shall they be seized? Are they to be taken out? The rule is that no one may be taken from there, and the case of escort is evidently not expressly excepted. Therefore, we ought not to except it. [rr] This argument, Decianus himself uses once very properly in discussing this very matter. [ss] Are we to think that a man under sentence and on his way to punishment who meets a cardinal should be set free, but that he should not be set free by the sanctity and mediating power of a sacred place? [tt] Likewise under the canon law there is no such distinction as you make, [uu] and consequently under
the canon law the immunity of the church is violated in this case, [xx] while 32
we ought to hold to canon law in the matter of the immunity of a church. Now, this is the view which we defend and which we call the common view, and to the authorities for it we can also add Romanus and Jason and the others, who, although they are talking of fugitives from justice, say that force may not be used in a church.

Even if this view were not the common one, I maintain that it should be held, [yy] because it supports religion and the immunity of churches, [zz] because it has been sanctioned by usage and decisions reached after thorough discussion. Furthermore, we assert that the custom which Decianus freely cites against it does not exist. Neither shall we find that it is the custom for men going under escort through a church not to cry out, nor is it the custom for them to allow themselves to be led through without protest in their forgetfulness or ignorance of the law. [aaa] The view which supports religion, even if stated at the outset, we regard as approved, for the reasoning which favors religion carries the greatest weight.

a—Remig. de imm. Eccl. fall. 30.
b—Clar. §. ñ. q. 30.
c—Soc. l. 18. de in jus voc.
d—Odd. cons. 18.; Soc. l. 1. de mil. l. cum anus. cons. post. lect. ad Trebe.
e—Corn. 2. cons. 159. et lib. 3. cons. 4.
f—Alex. 2. cons. 210. et lib. 5. cons. 24.
g—Dec. consil. 38. 55.
h—Myns. 6. obser. 60.
i—Suar. pr. Eccl. to. 1. p. 5. c. 3. §. 3. n. 45.
k—Odd. cons. 46.
l—Chass. consuet. Burg. de just. §. 5. num. 121.
m—Arch. c. sicut. 17. q. 4.
n—Rom. l. 11. C. de test.; Alex. 1. con. 121. et lib. 2. cons. 77.; Alc. 8. cons. 82.; Menoch. 73.; Odd. 37.

o—Odd. cons. 6.
p—Odd. cons. 37. 90.
q—Non. cons. 19. 23. 27.
r—Menoch. 1. num. 474.
s—Menoch. cons. 5. 95.
t—Myns. cons. 21.
u—Alb. de abu. me. c. 1.
x—Anch. cons. 166.; Ceph. 192. 45. 747.; Menoch. 35. 90. et 4. adip. n. 870.; Decia. 1. cons. 2. et lib. 2. cons. 32. 41. et lib. 3. cons. 123.
y—Crav. cons. 762. num. 1.
z—Navar. c. si quando. excep. 13. de rescript.
aa—Alc. 2. cons. 9. et lib. 8. cons. 10.
bb—Panor. 1. cons. 42.
cc—Io. A. Spec. de pro. Mand. ad Rom. 516.; Menoch. 3. ret. 765.; Aret. l. 21. prin. de testa.
dd—Rol. de lu. do. q. 14. 20.
ee—Menoch. cons. 2. 13. 37. 99.
ff—Fely. cons. 3.
gg—Menoch. cons. 306.
hh—Oldr. cons. 54. fi.
ii—Non. cons. 23. 44.; Decia. 1. cons. 2.
kk—Odd. cons. 63.
ll—l. 6. C. de aedif. pri.
mm—Alc. 3. praesu. 33.
nn—l. 7. §. ult. de injur.
oo—Flor. l. sicuti. §. Arist. si serv. vind.; Caep. l. 17. de aedil. ed.
pp—C. de his qui ad Eccles.
qq—Alb. 9. Virg.; Man. 3. conje. 19.; Bellon. cons. 52.
rr—Decia. 3. cons. 80.
ss—Caep. cau. 2. Cottamem. Cardinales.
tt—C. 6. c. 35. 27. q. 4.
uu—Fran. Mar. 1. decis. 987.
xx—Covar. 2. resol. 20.
yy—Decia. 2. cons. 80. 81.
zz—Decia. 2. cons. 52.; Myns. cons. 21.
aaa—Royas sing. 143.

CHAPTER VIII

Of the Protection of Sea-Territory

The Dutch made a strong protest because they were being intercepted on the high seas by an officer of the King and made to halt on the high seas with the booty which they had taken from their enemies, the Spaniards. They maintained that the violence was unjustified; that they had been embarrassed and robbed, and deserved compensation; and finally, that owing to this treatment they had a plea to urge against the Spaniards likewise, who, though captive, were being released in this way along with their captured property.

[a] But I urged in rebuttal what I once wrote in my books on war, i.e., that the word territory was applied equally to land and to water. [b] " Now the doctors say it is maintained that the lordly Venetians, the Genoese, and others possessing a port have jurisdiction and sovereignty over all the sea adjoining them for a distance of one hun- 33
dred miles, or even farther, if they are not near another state. And thus the lordly Venetians are able to inflict punishment upon the pirates captured there. And this Bartolus says was the practice of the Pisans in his time on his advice and on that of the famous Franciscus Tigrinus." [c] And this is the view of Bartolus regarding those one hundred miles, even though it be said that the sea is common. So say the rest unhesitatingly, if you except Comanus, that obstinate man. And you see how the sway of our King extends far toward the south, the north, and the west. [d] " The northern coast of Britain, since no land lies off it, is exposed to the vast and open main." Then, too, the southern coast of Ireland extends toward Spain; the western, toward the Indian realms of Spain. And thus, immeasurable is the broad jurisdiction of our King upon the sea. Nor is this jurisdiction maintained by the enforcement of a certain royal edict in which certain boundaries are laid down, beyond which the King refuses to have his territorial power extended in connection with these acts of war between the Spaniards and the Dutch.

Now, it is claimed that the Dutch were intercepted by an officer outside of these boundaries. For by a late treaty of peace between our King and the King of Spain, each is bound to protect the subjects of the other anywhere within his territories. Consequently, each of them is bound to afford protection throughout that far-extending jurisdiction. [e] There are, forsooth, limits laid down by right, just as there

are limits laid down by convention, and what applies to the former does not [necessarily] apply to the latter. And here we should follow the limits laid down by right, according to which peace and treaty agreements ought to be definitely understood, since other limits, afterward fixed, were not then in mind. Further, an edict is not retroactive: [f] " It is axiomatic that laws and constitutions put their impress upon future transactions and that they are not applicable to past acts." Nor is this declaration of the King's rights ([g] and thus to
34 be accepted the more readily) made in an edict, but it is an entirely new arrangement, and law. [h] For a declaration introduces nothing new and changes nothing; but this edict does change much, if the territorial power of the king really extends much beyond those boundaries as now fixed. [i] One might also reply that all authorities express the opinion that a declaration is of no effect where it works to the prejudice of the other party, as it would have done in this case of the intercepted ship, for which justice had been sought in accordance with the common law, and at the same time in accordance with the special peace agreement by the terms of which each sovereign was to allow no violence to be offered the subjects of the other in his territory. Justice was sought more particularly in accord with this special agreement on the ground that it would not be proper to curtail the obligation of a contract, whereas this obligation would now be curtailed if there should thus be offered a curtailed territory within which alone our King were able to afford protection to Spaniards.

Nor again is my position shaken by the objection that for a long time previous to this and by a usage of long standing those boundaries which have now been expressly fixed by the edict have been observed in questions of this kind. For, to pass by the chief difficulties that are raised by the attempt to make usage apply here, you certainly will not find that [k] the intention of our King in entering into the treaty took any account of that usage, if there was any usage, or even of the ancient statute which is said to apply here; and naturally, since these matters are not of mutual applicability or known to the other sovereign party to the treaty, [l] perhaps they are not known even to our own King, since they are mere questions of fact, and in a new kingdom. [m] So, too, is a parallel defense urged, whether a church may be without an incumbent, or have a prelate immediately appointed. What has our own peculiar English law to do with foreigners? Likewise, as the proverb has it, there is much English law locked up in the breasts of our judges, but foreign kings will not suffer themselves to be confined there. [n] That was a noble act of the Romans, in allowing the Ætolians to return to the *status quo ante,* because they had been deceived in a treaty by the consul Æolius,

owing to a formula of Roman law, with which they were not ac- 35
quainted, as I have elsewhere set forth the incident. Therefore, so much the less would the second of two powers entering into a treaty on terms of equality be bound by a usage or by an English law, not only unknown to itself, but even unheard of by [the English King] himself.

I add another point in the case under consideration. The man who captured a Spanish ship is, of course, a Dutch enemy; but, in this case, he is also an unscrupulous belligerent, since he is more truly committing piracy under letters of marque than carrying on war. [o] To the same effect is the law on similar matters: "If [. . .] shipmates or messmates [. . .] or those who set out to plunder." [p] Then, too, the history of Mithridates' leading general says that he "was more like a freebooter than like a belligerent," seeing that he was wandering among the islands, leaving devastation in his wake, etc. This predatory warfare is waged in accordance with no discipline or custom of war, a war against non-combatants and harmless merchants, and others situated far from the battle lines, [q] although it is only what takes place at the front that really seems to be done in war. [r] This is the substance of my full treatment of the proper law of war against armed men in my books "On the Law of War." These books I mention with no lack of modesty, but to the end that men may know I have always held these opinions.

[s] Now, I know that it is the King's business to determine what limit he wishes to put to his kindness, and yet I would dare to affirm that he had no desire whatever to show any kindness to these pirates, and to reduce the boundaries of his jurisdiction by means of that edict. The King would not have limited himself for the sake of those wretches, who thus would have been able to widen the field of their depredations. [t] Therefore, neither could this be the interpretation of the edict, that those might be advantaged whom the King, the framer of the edict, certainly had no wish to advantage. And yet, why should there be discussion on this point? This same captured ship was brought within those new boundaries which they mention, and rode here at anchor, and even lay in port. And further, the prisoners were brought on land, and then taken back on board once
more. [u] Therefore, not only within those boundaries, but straight 36
into the strongholds of the pirates might the officer of the King have followed them, since they offered violence within these boundaries to a captured ship and to captured people. And, of course, on the very instant that the captured ship came within these boundaries, it became safe from all violence. [x] It is in this way that one "is at once understood" to have returned by postliminium on entering within friendly boundaries. And I note those words, "is at once understood,"

[y] which speak for themselves, and there is no need here for the ruling of a judge. I maintain that just as it obtains in postliminium, it would hold good likewise in the jurisdiction of another, and that on entering it, they [the prisoners] would be safe from violence. And this jurisdiction it was the duty of the magistrate to defend, [z] else it would have appeared to his own great detriment that he had approved of what seemed a private jail. For it did seem like a private jail, when the Dutch detained Spanish prisoners within the territory of our King. Therefore, our magistrate was justified in suppressing unjust violence and punishing it. [aa] Officials who do not check attempted forbidden acts suffer punishment. Then, too, how does it concern the prisoners, if someone or other has offered violence to the Dutch?

[bb] "If you were to dispossess me of property by violence and thereupon Titius should take possession of it, I cannot enter an injunction against anyone but you. If a bandit should drive the holder and usufructuary from his farm, and on that account the usufructuary should not make use of the time fixed upon and thus lose his rights, no one doubts that the owner, whether he joined the usufructuary in an action against the bandit or did not so do, would have a right to retain the usufruct thus reverting to himself, and that what the usufructuary lost would be at the expense of that man by whose act it was lost." [cc] And to the same effect are other laws and bits of evidence.

Then, too, that other argument of my opponents about restitution made to those robbed has nothing in it. The Dutch could have been molested without prejudice. They did not suffer violence; they
37 were restrained from violence, [dd] etc. Exceptions such as this to the rule that the person robbed should receive recompense are frequent enough, so far is it from being the case that—as my opponents maintain—this ought to take place without exception. [ee] Even in the case of persons brought before the court the officials apply no other principle than this *de facto* extrajudicial one. Let the Dutch, let everyone enjoy the use of the sea, but without violating the jurisdiction of another nation. [ff] Let everyone remember too that there are limits to a journey by sea as well as to every other journey. [gg] Let them remember that other things, once undefined, are defined today, and that the distinction made by the law of nations, of eminent domains and jurisdictions, should be most scrupulously observed.

a—Alb. 3. de jur. bel. 17.

b—Castr. Bart. Ang. Fulg. l. 9. de jud.; Bar. de insu. vers. Nullius.

c—Bal. l. 1. C. de se. ex per. re.; l. 1. D. de const. pr.; Fely. c. ult. de resc.; Caep. de se. ru. 26.; Decia. 3. cons. 123.; Com. l. 15. de publica.

d—Tacit. Agric. et Caes. de be. Gal. 5.

e—Menoch. cons. 14.

f—l. 7. de leg.; Non. cons. 110. 111.
g—Crav. cons. 641.
h—Decia. 1. cons. 8.; Oldr. 318.; Imo. cons. 67. fi.
i—Decia. 1. cons. 7.
k—Rui. 1. cons. 74. num. 10.
l—Ias. l. 1. n. 32. C. de su. tri.; Decia. 1. cons. 18.; Rol. de lu. do. quaest. 14.
m—Fely. c. 19. n. 5. de accus.
n—Liv. lib. 36.; Alb. 3. de nup. 6. et 2. de ju. bel. 17.
o—l. ult. de colleg.
p—App. Mithrid.
q—l. 18. de excus.
r—Alb. 2. de ju. bel. 21. 22.
s—l. 191. de reg. jur.
t—Crav. cons. 118. n. 25.; cons. 984. n. 85.; Menoch. 603. n. 2.
u—Ceph. cons. 229.
x—l. 5. prin. l. 19. §. 3. de capt.
y—Ias. l. 5. C. de legi.; Dec. 3. cons. 1.; Fely. c. ult. n. 31. de rescript.
z—Clar. §. fi. q. 68.; Decia. 7. pr. 10.
aa—l. ult. ubi Fulg. C. de postul.
bb—l. 7. 10. de vi ar.
cc—l. ult. de adq. po.; l. 1. in. fi. uti po.; l. 3. si quis caut.; l. 5. ubi Bar. de usucap.
dd—Port. 2. comm. op. 44.; Com. l. 1. de no. op. nun.; Gail. 1. obs. 72.; Menoch. cons. 143. 439.; Alc. 5. cons. 132.
ee—Gail. de arrest. c. 1.
ff—Alb. 1. de ju. be. 19.
gg—Panor. q. 7.

CHAPTER IX

Whether We May Lawfully Put to Death Those Who Set Out to Serve with Our Enemies

It is maintained that all those who set out to serve with the enemy may lawfully be seized and put to death as enemies by the Dutch, for they are on the point of serving with the enemy, and the situation is the same as if they were serving at the present moment, [a] since the cases of being a thing now and of planning to be in the immediate future are parallel. [To put it in other words,] potentiality which approaches actuality is thought of as actuality, etc. Now there is no doubt that it is lawful to put to death all who are actually serving. And here I beg you to observe that the inquiry concerns those who have also given their names in to the enemy; who have received money as pay from the enemy, and therefore the journey they are making is undoubtedly made to join the enemy. Consequently, another argument follows, [b] drawn from the rule that one should consider the beginning when the end necessarily follows the
38 beginning. In the third place, the statement which is made about a soldier, that [c] when ordered to equip himself at once, he is regarded as equipped is really an axiom. [d] Fourthly, the ruling of Castrensis actually furnishes a stronger argument; this ruling I may cite from others, and Jason, too, follows it: that as an enemy who is proscribed may be killed without prejudice, so, too, may one be killed who is going to be proscribed in the immediate future. In the fifth place, they say that the Romans made this decision against the people of Lanuvium in a case which was less convincing. [e] When the people of Lanuvium set out to give aid to the Latins against the Romans, and when the first ranks had just passed out of the gates and the people heard that the Latins were already defeated and the troops had, therefore, turned back into the city, notwithstanding these facts, they were told by their praetor that "for this bit of a march they would have to pay a high price to the Romans." [f] In the sixth place, the facts which we once collected in support of a justifiable defense are cited, I mean the fact that we lawfully use force against him who is making ready to use force against us, etc. Seventhly, the point is made that the Dutch would have raised an outcry to no purpose after these Britons of ours had come to the Spanish camp. [g] So Clarus holds that one who has been caught on the road carrying

grain out of a country shall be punished, since it is certain that, after he has gone out of the country, the officials cannot pursue him. Therefore, the principle may be observed that, when apprehended on the road, he may be punished, just as if he had carried the grain out. [h] And on this point Baldus subtly remarks that the offense has been consummated, because it was through no fault of the actor that it was not, as well as because the loading of the merchandise, not the mere transportation of it, is punished, if it is clear that the man has taken this step with the intention of going to places where he is forbidden to go. Consequently, the offense has already taken its shape, as every offense must before it is punishable, and therefore is consummated, etc.

But, without being hindered by these and other similar considerations which do not really stand in our way, I think that the contrary view is the more correct one, namely, that the Dutch may not put to
death the Britons who are setting out to serve under the Spaniard. I 39
am influenced by the very cogent argument that these Britons are not enemies unless they are soldiers of the enemy, and they are not soldiers of the enemy, so long as they are not enrolled in the lists. [i] Notice the law: "Those whose names are not yet in the lists, even if they have been picked out and are traveling at public expense, are not yet soldiers." [k] A man has not yet been selected as a soldier who has not satisfied the three conditions of being put down in the lists, equipped, and stigmatized, as in any election three processes are regularly called for: choice, confirmation, entrance into office; and before the entrance into office occurs this law is not satisfied. The constitution of a person in the physical sense results only from the three processes: procreation, development, birth. Consequently, the constitution of a person in the civil sense results only from the three processes which have been mentioned, for civil processes are parallel to those of nature. When a man is set down as an heir, you have procreation; when the testator dies, development; when one enters into an inheritance, birth. Thus, before the property is made over, there is no heir.

Like this are the other cases which Jacobus de Arena discusses in Cynus in that question of former days, whether the emperor has all his power before his coronation. Now, although in the case of the emperor, they reach the opposite conclusion, they do so for other reasons, and they leave these arguments of ours unweakened. In beneficent matters, they say, actions begun are regarded as completed. This case of the exercise of imperial power is beneficent. Therefore, say I, in prejudicial matters an action begun will not be regarded as completed, and this right to exercise the power of an enemy takes the form of a prejudicial act. Now, these arguments are not weakened

by the fact [l] that to offer oneself as a soldier may be an offense and that it may not be of importance that a man's name has not been set down on the rolls, as Trajan wrote in reply to a doubt raised by Pliny, for in that connection this emperor expresses the opposite opinion, namely that the day on which the soldier takes the military
40 oath and is accepted, makes him reveal the reality of his motive. Note, too, that these soldiers of ours have not yet been accepted. And so, you see, there are two arguments in support of our position.

Now, the third argument is like the second, that, where action is called for, intention and potentiality do not suffice, [m] as Jason formulates and develops the rule. But without doubt action is called for, that is to say, one should be an enemy in action that he may be punished as an enemy. Of course, punishment is a prejudicial thing. Consequently, what is stated in that connection in the case of actuality, will not be accepted in the case of potentiality.

The fourth argument has to do with a similar point: [n] that a man found to be in a house for the purpose of committing theft cannot be punished for theft, if he has not yet begun to appropriate anything, for appropriation is the essence of theft. So in this case these people must have begun to serve under the enemy, if they are to be called enemies. Nor would it suffice, if they had even reached the enemy's land, for at the present stage they cannot be put to death there as enemies, and surely they cannot be put to death on any other basis, for on no other basis are they enemies.

[o] A fifth argument is drawn from the fact that Baldus and all the others maintain in very strong terms that a man under sentence may not be punished after a verdict has been given from which an appeal has been taken, or even from which an appeal has not been taken, provided the time limit for an appeal has not expired.

[p] The sixth argument is to the effect that, under the statute which calls for the life of him who has inflicted a mortal wound upon another, a man who has inflicted a mortal wound upon another cannot be accused and convicted of homicide, unless death follows, even if it be certain that the wounded man is going to die from the wound.

Now, this part of the discussion which rests upon rules and is supported by that first very strong argument will be happily rounded out, if I reply to those opposing arguments. Therefore, the first three points—they are one in reality—present no difficulty, because in the prejudicial matter of a punishment, what has been stated in these
41 arguments does not apply. [q] So in the case of a licentiate, a distinction is made, and the equitable view is held that in prejudicial matters he is not rated as a doctor. [r] Similarly, if one kill a person elected to a bishopric, he is not punished as if he were to kill a bishop. Of this character are many other cases. Therefore, [s] Jason

is wrong when he says that Angelus can be defended for writing that he who injures a scholar bidden to matriculate is punished as if he had injured a matriculant. It is not true that Angelus can be defended in a case of potentiality approaching actuality. [t] Indeed, in the matter of punishments and of prejudicial cases, potentiality approaching actuality is not regarded as actuality, as other writers report, and as Baldus very properly says. He accepts the doctrine which has been set down in the third argument given above, because in the matter of punishments and of prejudicial cases language is to be strictly interpreted. He also makes the general statement that a man gets his characterizing appellation, not from that which he will be, but from that which he is. They are not soldiers of the enemy, although they will be. Here, too, this potentiality approaching actuality does not exist. Here that "straightway" (*confestim*) does not stand, as I shall show. I have spoken already of the man who has been chosen and is journeying at public expense.

The fourth argument, which seemed to be more explicit, does not create a difficulty, for on the one hand I do not find that dictum of Castrensis [u] in my copies, and indeed it is not commonly held. So, for instance, [x] Jason says about it: "Paulus de Castro in a lecture," etc. Alexander, who first reported this view, [y] also writes that Castrensis left the matter unsettled, although he inclines to this opinion. [z] Jason also says that he does not support it satisfactorily, and Alexander adds that that would be a remarkable view, if it were true. Indeed, Alexander himself maintains the opposite. [aa] Aretinus, also, writes that the dictum of Castrensis is very doubtful, and he argues vigorously against it. Even Socinus reports that his teachers (he means Alexander and Aretinus) hold a view opposed to Castrensis. Socinus himself also argues to the same effect, although he leaves the 42
matter to be thought over. [bb] Decius, also, has disagreed with Castrensis; Socinus, too, quotes Baldus as opposed to Castrensis, but I do not find that case in any one [cc] of the three lectures of Baldus, [dd] and yet he, with other writers, as I have said, discusses this point in quite vigorous terms. And so the definition of Castrensis has been most effectually ruled out of court. The fact that others teach that a man to be acquitted in the immediate future is regarded as acquitted would not help him. To this Aretinus correctly replies that the situation is not the same in the opposite case where conviction is involved, for this is the prejudicial case in which punishment comes, as I have said, while the other is beneficent, that is, it is a case not leading to punishment. "Prejudicial matters ought to have their scope narrowed, benefits ought to have theirs extended," says the rule. [ee] "It makes a great difference whether you are inquiring about the binding of a person or his liberation, etc." To this opinion

Socinus does not successfully reply with his distinction between an offense which has taken place and one which has not taken place, because after the offense has taken place, one deals also with a benefit, that is, with the acquittal of the offender. Now, I would say in support of Aretinus that it would be a mockery of the laws, if it were put in the power of a man to avoid punishment by anticipating his opponent in making the attack. [ff] So elsewhere I write that a marriage between young people still under parental control, consummated, but contracted without the consent of the parents, ought to be annulled—although marriage is a thing of most beneficent character—of course, because the children would easily protect themselves by this act of consummation. [gg] The matter of acquittal is beneficent, when there is a doubt whether an offense has been committed or not. But when it is clear that it has been committed, undoubtedly conviction is beneficent, since it is for the public advantage to punish guilty people. And here let no exception be singled out of an offense committed at the right time, because an offense is forbidden at any time and is punished. [hh] And in this way punishments are beneficent.
43 Likewise, in reply to the dicta of Socinus, [ii] which are also adopted by others, I remark that we have not before us the case of an offense followed up, but of fear that it will be followed up. Further, with Bartolus I observe: " I ask anyone, into whose hands the present discussion shall have fallen, not to make the distinction in this case a public one for fear that an occasion for murder chance to be given, etc." [1] This distinction is under very grave suspicion and for the reason that it requires to be kept quiet, because it gives opportunity for murder. In this way the replies to the fourth argument are of various sorts.

The fifth argument does not embarrass us, because the people of Lanuvium mentioned above set out with the authorization of the state. [kk] Therefore, they were enemies as soon as that war and that giving of aid had been decreed. In other words, in that case everything had been done to assume the name and the standing of an enemy. But the Britons start out as private citizens, and they are not enemies unless they have become soldiers of the enemy, as has been said. They have not yet satisfied the condition " of being with the enemy," and while the condition is unfulfilled it is exactly as if they were not enemies. Similarly, the common opinion is the same in the case of the man who has been condemned and in the case of a sentence which is pending on account of appeal. On this point Socinus writes that the sentence passed is conditional and pending, and " what is pending is not the same as that which is."

[1] Question 1, no. 32.

The sixth argument with reference to a justifiable defense, drawn from our books on war, presents no difficulty, because the present case does not fall into that class. These Britons are not making ready to commit an offense, but they are setting out to go to the Spaniard to see if he will receive them and make use of their services. So they are in this same conditional future.

The last argument does not present a difficulty, for it is based rather on usage than on law, as Clarus himself recognizes at the end. [ll] Baldus, too, in discussing those decrees—that is, the interdicts—spoke of the practice of punishing transgressors on the way. But the practice ought not to be extended. Besides, such a case has a perfect justification, while ours has a conditional justification, as I 44
have shown. This reply should be noted in opposition to all the arguments which could be urged on this point; for it is clear that the Spaniard is not yet using those Britons, and he may not set them down on his roll. How often have we seen men disappointed [mm] *al passare della banca* ("in passing muster"), as we Italians say. [nn] And here I add what is accepted in the case of the licentiate, that he does not rank as a doctor, because it is not absolutely certain that he will be a doctor, for he must still be examined and passed, and he may be rejected.

My conclusion is that unquestionably they cannot be put to death, that unquestionably they can be brought back, that perhaps they can be punished in some other, milder way. This last point Baldus supports, that he who takes the first step is not without sin, [oo] and this view Salycetus also holds, that the beginning too is forbidden, if the end is forbidden.

a—Ias. l. 3. de adq. poss.; Dec. 2. cons. 64.
b—Ever. lo. a vi. fi.
c—l. pen. de mil. test.
d—Ias. l. 2. C. de inoff. testam.
e—Liv. lib. 8.
f—Alb. 1. de ju. bel. 14.
g—Clar. §. fi. q. 82. s. 7. num. 8.
h—Bal. l. 3. C. de na. fen.
i—l. 42. de mil. test.; Baml. l. 1. C. de tiron.
k—Cy. l. bene. C. de qua praescr.
l—l. 2. 4. 8. 11. ult. de re. mil.; Plin. 10. ep. 29, 30.
m—Ias. l. 2. C. de inoff. testam.
n—Ias. l. 3. de adq. poss.
o—Come. l. 1. fi. qua se. si. ap. resc.; Anch. c. 7. de ap. 6. c. 2. de se exc. eo.; Soc. l. 3. de ad. po.; Clar. §. homicidium.
p—Ias. l. 8. in illa. de V. O.
q—Barb. add. Bal. l. 3. C. de fur.
r—Bal. l. 1. sol. ma.; l. 3. C. de fur.
s—Ias. l. 2. C. de inoff. testam.
t—Dec. l. 19. si cert. pet.
u—Venetae editionis, 1593.
x—Ias. l. 8. §. pen. n. 16. sol. ma.
y—Alex. l. 3. de adq. poss.

z—Ias. l. 113. de V. O.

aa—Aret. & Soc. d. l. 3. de adq. poss.

bb—Dec. d. l. 19.

cc—Taurinensis editionis. 1576.

dd—Bal. l. 4. de stat. ho.

ee—l. 47. de oblig.

ff—Alb. 4. de nup. 7.

gg—Dyn. reg. 49.

hh—Alb. 5. de nup. 10.

ii—Pan. cl. 1. de pri. et exc. priv. et c. 11. n. 2. de Iudae.; Fran. c. cum in multis de rescr. 6.; Alb. 1. cum quid. n. 8. de re. ju.; Menoch. cons. 3. 6. num. 3.; Anch. c. significavit. de Iudae.; Fely. indi. statutum an valeat, quod homic.

kk—l. 24. de capt.

ll—Bal. d. l. 3. C. de na. fe.

mm—Ad delectum, lustrationem, apparitionem, ostensionem.

nn—Rui. 1. cons. 19.

oo—Saly. d. l. 3. C. de nau. fe. num. 6.

CHAPTER X

Of the Ship That Makes a Raid under Convoy of Another

The decree of our King (i.e., Spain's) says that, when a ship has more Britons than foreigners, it is to be regarded as piratical, if it annoys any friend of the King. In this case a sloop manned by Britons alone, but under the convoy of a Dutch ship captured a Spanish vessel. Shall the booty be wrested from the Britons on the ground that they are pirates, or shall it be left untouched on the ground that it was won by the Dutch?

Now, not the Britons, but rather the Dutch, who afforded them protection with their large ship, appear to have captured it.. [a] For example, he who was present with a weapon when a crime was committed, even though he did nothing else, is said to have been an accessory to the crime. So, likewise, in the case of this booty, we shall 45
find that the Dutch ship played this part. At the very least, then, a share of the booty will fall to the Dutch ship, and indeed a much larger share than to the British ship, just as the Dutch vessel is herself much larger, and, as the leader, of much more consequence. [b] Then, too, this law of war has been regarded as just from the remotest antiquity, namely, that they also should receive a share of the booty who have held the enemy in check, and that those who have captured the booty should not hold all of it, since it was realized that the others too had played a part in securing it. In harmony with that just and ancient law, the pontifical ordinance provides that even the monks who do not toil, but devote themselves to literature, shall enjoy the labors of others. Besides, this fixed but unwritten law is not violated and the Dutch are not injured by the edict of the King which we mentioned, for this case does not come within the purview of that edict, because it speaks of one ship where the majority of the crew are British. But this is a case where we have two ships united and the whole number of Dutch much greater. [c] The ships are like one body, just as a fleet is one body. [d] Of one body are the clergy who are absent on necessary business and those who are in residence. Yes, even the former class are regarded as residents in the eyes of the law. And accordingly, the edict favors the Dutch rather than the Spaniards, inasmuch as in that company there were more Dutch than Britons. The Dutch will add—what is perfectly true—that the purpose of the King's edict was to check trickery which, it was asserted,

took place whenever a few Dutch were added to the crew as a blind, while the English remained in reality the leaders of the expedition; but here the Dutch ship herself would be in control. They will add, further, that the scope of the edict should not be extended to include this case, which lies without its letter and intent. These are the
46 difficulties which I raised in my own mind, on taking the defense of the Spaniards.

It is my invariable custom to ponder carefully what can be urged against the side which I have to defend. Now, the difficulties I have just raised did not trouble me at all, and I contended that the British ship was piratical, that the Dutch ship should receive no part of the booty, but that rather everything should be restored to the Spaniards. [c] Then, too, I made use of that principle, elsewhere firmly established, that the Dutch had not acquired a legal title to the property, because it had not been brought within their own fortified lines, and because the property in question, on being brought through the territory of our King, reverted at once to its former owners. But likewise, the wording of the edict, as I asserted, applied to the present case, because it makes a ship piratical if the majority of the crew are British, and on board this ship all are British.

Then, further, the intent of the edict, which is to prevent evasions of the law, would cover this case; and here we should have a most flagrant evasion, where the very thing forbidden is done in some unforeseen way. [f] Evasion lies in the method, and there are many methods, [g] against all of which provision must be made; such is the demand at once of both private and public interest. [h] Precaution must always be taken against everything elusory, that is, every indirect nullification of the law, and against everything illusory, that is, every specious deception. [i] And lest any of these [forms of evasion] occur, we have, too, an extension of the law, where criminals are concerned, through the principle of the "faulty," etc.; so little is it our duty to summon fictions to the aid of those subterfuges, just as we have an evident fiction there, where two vessels are regarded as one. The intent of the edict, the purpose of the King was to hinder the Britons in the practice of piracy. Consequently, that intent, that most laudable purpose should receive assistance by every interpretation.

And so, if the piratical ship which secured the booty is British, what right, pray, will the Dutch convoy have to that booty? To the British ship comes none of the booty secured. The Dutch vessel's share comes from what the British ship has. Therefore, to the
47 Dutch ship comes nothing, since its share is but a part of the whole quantity gained by the British, which amounts in all to absolutely nothing. The Britons cannot give others what they do not have;

and the King takes everything away from the British freebooters; therefore, nothing comes to the Dutch from the unrighteous booty of others. And by these considerations a complete answer is given also to the opposing arguments.

a—Decia. 8. pr. 10.; Ang. disp. renovata guerra. col. 6.

b—c. 3. de V. S. in 6.; Saly. l. 12. n. 6. C. de postl.; Aya. 1. de jur. be. 5. n. 7.; Ang. d. disp. in 2. puncto. et disp. ex orta guerra. col. 3.

c—l. 76. de jud.

d—Host. c. 1. n. 8. de cel. miss.

e—supra, c. 2. 6.

f—l. 28. ubi Alb. de leg.; Fulg. l. 5. C. eo.; Anch. c. 1. n. 70. de const.; Corn. 3. cons. 29.

g—l. 38. de re. vi.; Anch. cons. 11.

h—Fely. c. ult. de rescript.

i—Ias. l. 30. n. 21. de leg.

CHAPTER XI

Of Money Received from Pirates and of Their Partner

An enemy of the Spaniards who was on a piratical vessel belonging to the Britons, either as leader or soldier, received from the pirates money, or property in some other form. The question arises whether these goods, be they property or money, can be recovered from this person by those who have been robbed.

Undoubtedly, if the person in question has received property which is in existence, it is clear that he is called on to restore it. [a] So stands the law, and so hold the doctors in commenting upon it; for they even condemn to this penalty the man who buys the property—the man who buys it in good faith—and without allowing him to receive compensation. So much the more will the law condemn the business partner in a piratical enterprise. [b] But if the aforesaid person who has acquired property in good faith and has used it in good faith is still held for the amount by which he has become richer, what shall we say in the case of a pirate's partner? [c] Further, a man is considered richer, even when a debt has been paid, [d] and the man who says that he has used up the property has to prove it, although he too would be called richer, even if he had lost the goods by being cheated. But in this case, we have not good faith on the part of him who knew that he was receiving property from pirates.

But what I have said in the case of goods will also be true
48 in the case of money, if it is still in existence, for in this matter money differs in no wise from other things, [e] as Menochius brilliantly states it in his opinions. The same doctor says also that if oil, wheat, money, or other things consumable with use have been consumed with use by a money-lender or extorted in the form of interest, it is true that the ownership of them has been transferred, but still, although the money-lender might not be solvent, an action for the restoration of the interest would stand by way of relief. This is true in the case of stolen goods and thieves, because usury would be on a par with theft, according to the opinion of the same writer.

Now, concerning this matter I mention one thing more, which may have great weight here. The law, he says, prevents deceit being practiced upon it, so far as it can. But if the transfer to another of a loan bearing interest were allowed, deceit would be practiced on the law, because it would be easy for the money-lender to transfer

to another the receipt coming from the debtor who would agree that he owed one hundred per cent. interest, and in this way it would be easy for a money-lender to exact usurious interest indirectly. We hold just this view, that it would be easy for the pirates to transfer property captured in piracy to another person whom they might have with them, as our pirates had this man with them. So it could be pretended that what they could not have kept was given to him by the pirates. [f] For while they might seem to have been wicked in giving it, still he might not seem to have been wicked in receiving it, although he might have done the plundering himself as the enemy of those who were robbed.

But I make this point, too, against this man, that he would also be a pirate here under the edict of our King, in which a ship is considered piratical which has more Englishmen than foreigners. This is the case about which the discussion arises. But if a ship is piratical, then all who play any part on it are pirates, and consequently he is a pirate. [g] Of course, what is held concerning a ship is to be accepted with reference to the sailors. [h] No ship of itself ever injured anybody, as Augustus said.

The edict of the King is not to be applied to the English only;
for ample provisions had been made for them even before the 49
edict was promulgated. Besides, one cannot deny in this case the power of the King over this partner of his Britons on the ground that he was not the subject of the King, because it is enough to hold him, that he had made himself the partner or the captain of these subjects, for as this man could not do these wrongs to the Spaniards in the territory of our King, so he cannot do them in coöperation with our King's men. [i] See the argument which the doctors often use in passing from a place to a person and *vice versa*, the argument which Baldus also uses in a strict sense concerning a subject place and subject persons. [k] He becomes guilty of parricide who gives assistance in committing parricide; of breaking the peace, who gives assistance to one who is breaking the peace; of violation of sovereignty, who aids a subject in committing that wrong. Consequently, a man who may not be a pirate, so far as his own actions are concerned, may be one through the actions of his associates, and may be at least held under the civil law to return that which he has received from pirates. [l] See, says Sotus, how much danger there is in having business relations with usurers (we make the same statement, too, of thieves); see how their subordinates may be held to restore the wages received from them.

Sotus says also, in view of the fact that the ownership of stolen money may not be transferred to a thief, that it follows that whoever should sell bread to a thief should be required to restore the

price of it to the real owner [of the stolen money]. In other words, in these cases also the price takes the place of the thing, and the thing takes the place of the price, [m] as Menochius also, following his predecessors, teaches in the case of usurers. In common with him and with others, we hold this view the more concerning thieves and stolen goods. I note, besides, that this definition is applicable in this instance; [n] for I know that in other cases other distinctions are made in deciding whether the price takes the place of the thing. [o] It takes the place of a thing which does not exist and has not been given for value received, and such a situation we say exists here. [p] We do not say that a piece of money coming from the price of a stolen thing is stolen, but we do say that it takes the place of the thing.

Furthermore, this man cannot be defended on the ground that he was not aware of their piratical status, since this supposition would not be probable in the case of a man thoroughly versed in affairs as he was. [q] Now, with reference to a man who has bought from a thief, the opinion has been expressed that people ought to enter into business relations with prudence, so that they know the men with whom they have dealings and what their status is. [r] A man is held for theft, if he knows that a thing has been stolen and if he receives it, buys it, or wins it at the gaming table, [s] and in a doubtful case, he is presumed to have known, because he ought to be certain of the status of the man from whom he gets it. [t] The man who has dealings with another ought to be sure of the status of the thing for which he contracts. It holds good also even if he did not know, because he ought to have known. And these conclusions apply also in their bearing on court proceedings.

Furthermore, the point always holds against this enemy of the Spaniards that, although he had taken Spanish property from our pirates, still he would not have made the captured property his own until he had brought it within the fortified lines of his countrymen. Whereas we assert that what had been taken becomes free here in the territory of a friendly King, that it is free here.

a—l. 2. C. de fur.; Caepol. cau. 10.; Alc. 3. praesu. 29.
b—Clar. §. furtum. num. 26.
c—l. 50. de don. int. vir. & ux.; Scip. tra. eo. lib. 1. c. 33.
d—Dec. l. 8. §. 1. si cert. pet.; Rui. 2. cons. 29.; ro. Ge. decis. 83.; gl. l. itaque. de dol.
e—Menoch. cons. 300. n. 30. 62. 44. 73.
f—l. 1. l. 4. de cond. ob turp. ca.
g—Bald. l. 9. §. ubi decret. n. 29. de off. procons.
h—Dio. lib. 50.
i—Bal. l. 6. si cert. pet.; Alc. l. 22. eo.; Ias. l. 22. d. V. O.; Pan. c. 5. d. imm. eccl.; Dec. c. 14. de rescr. c. 1. de fi. instr.; Decia. 2. cons. 1.; Ceph. 615.; Anch. 11.
k—Dec. c. 1. de off. del.
l—Sot. 6. de ju. q. 1. a. 4.
m—Menoch. d. 300. n. 19.

n—Doct. l. 10. si quis caut. l. ult. de neg. gest.; Castr. l. 3. l. 6. C. de re. vi.

o—Rot. Gen. decis. 171.

p—l. 48. fi. de furt.

q—l. 2. ubi Fulg. C. de fur.

r—Castr. d. l. 2.; Bal. l. 14. eo.; l. 9. C. de vi. pu.; Ias. l. 36. de cond. ind.; Anch. c. 4. de. fur.; Menoch. d. 300. n. 75.; Rui. 4. cons. 82.

s—Dec. l. qui cum alio.; Alc. 3. praesu. 29.; Ceph. cons. 40.

t—Decia. 3. cons. 124.; Conta. si de mo. po. in ampl. num. 88.

CHAPTER XII

Of Property Captured by Pirates and Afterwards Bought by Friends in the Enemy's Country

This question appears to be clearly settled by the law, as the following passage shows: [a] "Robbers had stolen a slave from you. Afterwards that slave had come into the hands of the Germans. Then when the Germans had been conquered in war, the slave had been sold. Labeo, Ofilius, and Trebatius assert that the buyer cannot acquire ownership of the slave by usucaption, because in reality the slave was stolen; and that his once belonging to the enemy, or returning by postliminium does not affect this rule." The law says "robbers." These are our pirates. It says "a slave." We speak in the same way of other things, [b] because slaves are things. It says "Germans," [c] that is, an enemy, just as the law afterwards explains, and
51 a glossator, too. And therefore the Berbers in this case of ours are enemies of the Spaniards in quite the same way. The law says, "when the Germans had been conquered in war." Now the Berbers, I admit, have not been conquered, nor has the property of the Spaniards been recovered from them through victory. Cash has bought it back from the pirates in the Berbers' country, in part, it is asserted, from the Berbers themselves, to whom the pirates had sold it or handed it over to be sold. But in each case, a sale takes place, both in ours and in that of the law quoted. The law says, "had been sold," having been brought back through victory, but in our case through the trade which our English merchants carry on in Barbary. The law says: "They assert that the buyer cannot acquire ownership of the slave by usucaption." And therefore he would not become the buyer's, "because in reality the slave was stolen," [d] "and when a thing is stolen, in that case the right of ownership shall be perpetual," and that, too, against a *bona fide* possessor. This is the principle to be noted, because it applies clearly to our case also. "The fact that he once belonged to the enemy or returned by postliminium does not affect this rule," [e] for he had been merely *de facto* the enemy's, and they had not been made his owners. This is the way Socinus, the nephew, argues on this law, and I say that the alleged owners could not remove the taint of theft by bringing the enemy into their plea; [f] just as a field reverts to its former owner, from whom it has been taken by a river, and to whom it has thus ceased to belong, though not in strict reason. Moreover, return by postliminium would not be sufficient

either to permit of acquiring ownership by usucaption, since the property has not thereby come once more under the control of the owner, even though it may now be claimed; and therefore the taint of theft has not yet been removed; [g] possession must be gained by the [real] owner and with full knowledge of the facts.

Thus the interpretation of the law which I have quoted makes it clear that the traders did not acquire a lawful title to this merchandise, even though they bought it back from the Berbers themselves; for it is likewise clear that the Berbers were brought into the transaction for the simple reason that trade is not permitted in that country, except through the medium of some official of the 52
treasury. Accordingly this person would give an empty appearance of regularity, while the substance of the contract was with the pirates. [h] On this question, however, Ayala opposes us; in the case of the slave he admits our interpretation on the score of postliminium, but not in other cases where postliminium does not exist. But one should note the general intent of the law which has in view anything which may have been stolen. [i] Likewise, there is postliminium in the case of other things, too, if they enter the country in a lawful manner. And as to Ayala's added statement that unquestionably this property became the enemy's, and that therefore the original owner lost his ownership, Socinus, as I said, denies this unquestionableness. But let us grant its unquestionableness for the sake of argument. Does it follow, likewise, that the property does not revert to its original condition? And yet this is the question now before us. [k] "If the enemy have taken from an island a man who had been exiled there, that man, if ransomed, no matter what chance leads to his return, will assume the position which he would have assumed if he had not been taken away." This is the law as the glossator expounds it in regard to our case, that no one by any chance may criticize me for speaking somewhat aside from the point. In the third place, Ayala writes that the Atinian law has to do with citizens, not with enemies. But this, too, has no bearing on our present case, which has to do, not with enemies, but with friends and allies who bought back Spanish property from the enemy. Then, too, Ayala himself feels the emptiness of this argument of his, and accordingly writes modestly that everyone should use his own judgment here. At least, he considers this concession perfectly fair, that action against these possessors shall be taken not otherwise than if the thief or his heirs are insolvent. But this is another question, although here, too, the interpretation would favor the Spaniards, since the pirates own absolutely nothing. For these reasons we are justified in concluding that the merchants did not secure a legal claim to the property and that it should be restored to its Spanish owners.

We have still to consider whether the merchants can recover
53 from the Spaniards the price which was paid. [l] Now, the law concerning a free man bought back from the enemy is stated for us in more than one definite enactment; [m] as is the law concerning another man's slave that has been bought back. Furthermore, we have likewise law concerning every other thing bought back from the enemy, to the effect that the price should be restored to the buyer. But this purchase was made from the pirates, as even the pirates themselves testify, and the marks of the former owners, still to be seen on the merchandise, strengthen this testimony. [n] These witnesses are believed, provided the action is a civil one; and without reserve, when the action is not against confederates in the crime. Now, who does not know that the marks of earlier owners are regularly erased by the later? [o] But these undisturbed marks show that the owners were no others than those who really were such. [p] Therefore, here, too, comes into play the clear interpretation of the law regarding merchandise, for the merchandise [in this case] with its marks still bears witness to its owners, and, consequently, should be restored without payment, even by a *bona fide* possessor.

[q] He who buys my property of a thief does not manage my business to advantage, since I might have claimed my property without paying anything, as Menochius says somewhere. [r] Now, the same writer makes a mistake somewhere else in claiming that a buyer of good circumstances and reputation recovers the price paid; since *bona fides* would save him from the presumption of guilt, but not from loss, if the *bona fide* possessor makes restoration without recompense.

Well! There would not be a case here of purchase from a thief, but rather from pirates of a foreign nation, [s] in which case the laws and the doctors maintain that the price paid must be returned. But I shall reply—if that objection is made—that the English pirate does not come from a nation foreign to Spain. [t] If foreign nations are such as had the right of postliminium between themselves and the Roman people, then such nations are enemies. Now, between the Spanish and the English postliminium would not obtain
54 at present, since the former retain their freedom and ownership of their property in our country exactly as they do at home, and the same is true of us in their country. Foreign nations would be those with whom we have no friendship, and between whom, therefore, and us, postliminium would obtain; [u] as another law has it, and as I have explained elsewhere.

a—l. 27. de capt. et postlim.
b—Alb. 3. de ju. be. 9.
c—l. 24. de capt.

d—l. ult. vi. bo. ra.; Inst. de usuc.; Ang. de leg. Atinia.
e—Soc. ju. l. 1. n. 112. de adq. poss.
f—l. 7. §. quod si toto. de adq. re. dom.
g—Inst. de usuc.; Caep. l. 5. n. 9. C. pro emp.; Corn. 1. cons. 178.
h—Aya. 1. de ju. be. 5. num. 40.
i—l. 2. de capt.; Alb. 3. de ju. be. 17.; Soc. ju. l. 1. n. 66. 68. de adq. poss.; Fab. 2. sem. 3.
k—l. 12. de capt.
l—l. 43. fi. ubi gl. de leg. 1.; l. 2. C. de postl. rev.; l. 3. §. 2. de ho. li. ex.; l. 15. de capt.; Soc. ju. l. 1. n. 455. de leg. 1.
m—l. 12. §. 5. de capt.
n—Rui. 5. cons. 158.
o—Foller. add. Mar. Spec. p. 6. n. 62.
p—l. 2. C. de fur. ubi not. item.; Basil. 60. ti. 6.
q—Menoch. ad Ias. l. 19. C. de procur.
r—Menoch. 5. praesum. 29. n. 30.
s—l. 6. de capt.; Menoch. d. 29. n. 26.
t—Bud. l. non dubito. de capt.; l. 19. prin. ubi et gl. eod.; Ang. disp. renovata guerra. princ.
u—l. 5. de capt.; Alb. 1. de ju. be. 12.

CHAPTER XIII

Articles Sold in Brazil in Violation of the Law Are Sought in England by the Spanish Fiscus

We maintain that what was sold by the Spaniards to the Dutch in Brazil has become the property of the Spanish King, since confiscated property comes to the fiscus, and this property has been confiscated.

[a] Confiscated property is acquired by the fiscus at once, under the law itself: [b] "And this ruling carries execution with it, since this is one of the special cases in which there is no need of a suit, because the penalty may be imposed when the property is found and it has regard to the property only. Other penalties are regularly imposed by way of action or suit and through a verdict and execution," to quote the correct statement of Raphael Comensis. [c] Bartolus, and Alexander, too, state that, when the offense concerns property, ownership "undoubtedly" falls to the fiscus without a verdict. [d] When the law covers execution, then no other execution or act on the part of a man is needed. [e] Ownership is vested in the fiscus at once, and he who has acted contrary to the law ceases to be the owner, as Duarenus also says in this connection. Indeed, it is certainly the opinion of everybody. [f] So completely does this property cease to belong to the former owner that he may now buy this very property,
55 and no one buys his own property. [g] So completely does it become the property of the fiscus that the fiscus may act in this case by merely claiming the property. And why shouldn't he, if he is the owner? [h] For the simple reason that if a man has acquired the ownership of a thing, he always acts in this way, as the titles of *De rei vindicatione* [1] show, and as the doctors teach in accordance with these titles. Why is not the fiscus the owner, if the former owner has lost ownership? [i] Ownership cannot hang in the air. [k] So true are both these facts that the property has ceased to be his and that it belongs to the fiscus, that a man may be held to the fiscus for the price of it if he loses it by fault before it has been handed over to the fiscus. These conclusions are sure. [l] And we feel perfect confidence in talking of the goods in question as confiscated, if public declaration of their ownership has not been made. But even if a thing has been sold contrary to the requirements of the law, [it is subject to confiscation], as Duarenus and others state.

[1] [*Dig.*, 6, 1, and *Code*, 3, 32.]

In this case a sale was made to Dutch enemies and to other aliens in contravention of the laws of the Portuguese kingdom, which forbids commerce there with those who are not Portuguese. [m] Commerce with the enemy is forbidden even by the common law. This is the common law. Let not the point of covering money into the fiscus outside of the realm be urged against us as an objection, if confiscation should take place under a statute or a special law, for this point aids the Dutch in nowise. It does not aid the others, because confiscation always results from the common law, even if the stoppage of commerce is based on a special law, for the direct reason for confiscation is derived from the common law, which confiscates a thing sold in violation of the law. However, in this case the confiscation of all this property in England is not asked for, but we ask that what was confiscated some time ago in Brazil under the immediate action of the law be handed over here. We ask for property acquired in that country by the Spanish King, found here, and here to be turned over to the Spanish King as his. In this case there is no need of an action, as I have said. There is no need of a verdict here, unless, perchance, concerning the declaration of the loss; there is no need of an execution here, except to secure a sure 56
result. That matter of not confiscating outside the realm does not concern property confiscated under the immediate action of the law. What has been confiscated cannot be confiscated again. The question has no place where the offense has to do with a thing. Therefore this question has no connection with ours. But suppose there is here not a question of confiscation, but of another penalty. [n] If a claim exists, its satisfaction is sought anywhere. Still, even if the question should arise of the right to confiscate, because at present we are talking not of immovable property, upon which that question turned, but of movable property, even that question in the present instance would in no wise concern us. Movable property is always confiscated even outside the realm: [o] "Note that the emperor confiscates 'movable' property outside of his realm, and bear this in mind. The reason is that 'movable' property is connected with a person." Baldus and [p] the others who follow Baldus hold that it is not bound to the place, and therefore comes under the control of the judge who confiscates it, even if it be outside of his territory. I may say also, in this connection, that they add Salycetus, Alexander, Socinus, and Cotta, and they assert that this view is the more approved one. For my own part, [q] I add to them Romanus and Brunus, cited by Natta on the opinions of Alexander. [r] Furthermore, I mention Ruinus, Cephalus, Ancharanus Regiensis, Fridericus Scotus; and the last mentioned writer, too, develops the subject at some length, and notes by way of distinction that the place does not determine the ownership of

"movable" property, but only determines where an effective seizure may be made; so that this view is not only the one more approved, as Caravitta writes, but it is also without doubt the common one. [s] Whatever the writer mentioned holds, Baldus would like to set up the opposite opinion in the *Libri Feudorum,* [t] and in this opposite position Alexander, also, would seem to take his stand, as does Molinaeus in his notes on Alexander.

57 [u] Now Clarus says that in practice he has never seen the former opinion of Baldus followed. But this view of Clarus amounts to nothing; for he does not say either that he has seen his later opinion followed. [x] And yet through the non-occurrence of a usage, a purely negative consideration, and therefore, not implying an act contrary to the law, the law is not abrogated, [y] nor would Clarus reach any conclusion if he had made the statement concerning regions beyond those known to him and concerning times beyond his own. [z] I wonder that Bursatus has not noticed this, but, relying merely on these remarks of Clarus, he actually holds an opinion contrary to the common view; and takes a scornful attitude, although he indeed states the common view and talks about other views; so that, perhaps, [aa] what another very learned man urges against him may be true, that he is in the habit of collecting his authorities without making any choice between them.

So far as Alexander goes, he does not firmly hold the later opinion of Baldus and quotes it only once, [bb] although he states the earlier opinion vigorously several times. With reference to Molinaeus, who refers to other works of his own, I would say nothing now, because I have not those works. Yet if one person teaches a doctrine, why should that influence us against the common opinion of so many writers, and how does Baldus himself reach the conclusion that the ownership of "movable" articles is decided by territory, since, as he himself states in his feudal law, such articles are confiscated by the people of a territory? [cc] They are turned over to the people to plunder, as other writers put it. The law speaks both of the sovereign who confiscates in that region, of the sovereign in whose territory this "movable" property has been confiscated, and of him who is judge of the person suffering confiscation. So, naturally, that property would belong to the same territory as does the person whom the goods concern, as has been stated in the earlier opinion of Baldus. So Baldus comments correctly on that law, and so we shall understand him in accordance with the law on which he is remarking and which he cites. This ought always to be done in a doubtful case. So we shall also understand the others, who have followed Baldus here, in accordance with the authority of Baldus
58 which they cite. This, likewise, ought always to be done, [dd] even if

the words seem to give another meaning. We shall understand Baldus and the others in such a way that they may not be inconsistent, [ee] as we commonly do in such a case in opposition to the mere sound of the words.

[ff] Besides, the doctrine which holds in a feudal matter is not extended into another field, especially where the ruling may be different, as it is here. Consequently, this argument takes this form both when the question of confiscation is raised and when there would not be a delict connected with property.

What are the points on the other side? Is it not evident here that the King of Spain has confiscated this property? Is not this the property of subjects, with reference to which the earlier opinion of Baldus was set down? But the Spanish law brought about the confiscation, the Spanish law which is the same as the King. But the Ambassador asks for the confiscation, and he is the King here to all intents and purposes. But it is also clear that this property was bought in a Spanish [1] land of Spanish subjects. [gg] Therefore, the purpose of the Ambassador has been well founded in saying that the goods belong to the territory where they were situated, [hh] and that the increase of anything of ours, whether of land or of animals, is itself ours, even if we gave no thought at all to the seed. [ii] Now, ownership has not been transferred to the purchasers, because the law forbids commercial transactions. This opinion is held by everybody. [kk] Even the seller could make good his claim, and the purchaser in this case loses the purchase money, as in more than one passage the ancient commentator, Andreas de Barulo, has set forth in his commentary on the books of the Code.

It does not count for the Dutch enemy, does it, that they are within their rights in taking from the Spanish and in making the stolen property their own? We claim that they have not acquired ownership until the captured property has been taken within the fortified lines. This is proved by the clear statements of the laws, by the harmonious views of the commentators, by the settlement of cases on the point at issue. Besides, from these judgments which count against the Dutch there follows also a general argument, peculiarly applicable here, that if property which has been almost acquired by the Dutch is held for the Spanish in England, and if this
property about which the case before us centers belongs to the Span- 59
iards, because it has been confiscated by their King and not yet made the property of the Dutch, assuredly, it will be kept for the Spaniard here in England. [ll] All of it has been confiscated and forfeited because the declaration of ownership has not been made, or, at least, was made falsely and amounts to nothing. Let the facts be set

[1] [Brazil belonged to Spain at this time.]

forth. Let the case be established. Let them show that trading was lawful, as they boast. Then nothing will be asked for except the duty.

But it is all claimed under the law. It is claimed here under the law. [mm] Another judge is bound to carry out a verdict given elsewhere, as all our learned men teach. But if he is bound to carry out the verdict of a man, he is, without doubt, the more bound by the verdict of the law in our case. [nn] A person brings suit anywhere under an action which is complete in itself, so that there is no need of a document from the judge, if suit is brought by an action under the law. [oo] This principle holds, also, for different categories; for the law, which is based on natural reason, both teaches that justice should be rendered to everybody—it applies, too, to different categories—and holds everywhere. Every prince or judge is bound to render justice to anyone who asks it, since this is the office of justice, an office which clearly comes from the natural law which is in force everywhere. Now, no one will deny that if a man who owes money is absconding, he can be summoned before a tribunal anywhere. All these points Covarruvias mentions, and he discourses on other matters.

[pp] Besides, in addition to him you will notice Ancharanus, who states that, if a vagabond can be brought before a court anywhere, much more can a man suspected of flight, since flight, as is quite clear, suggests a delict more than vagabondage does. [qq] This view of Ancharanus is followed by Romanus, Alexander, Jason, and the others in general, however Aretinus may assail it and rail at it. On his side, perhaps, there may be one or two. [rr] Still one point, which Jason notes in another case, will perhaps be urged against us, that it is not lawful to summon to court a foreigner passing through the coun-
60 try with my property, nor to have my property taken from him. Therefore, in our case it may not be lawful for the Spaniard to have his property seized for him here, or for him to summon here before a court the Dutch or others passing through the country with his property.

But the reply is easy and takes more than one form: that this ruling may not be correct; that it applies when the fugitive can legally be brought to trial elsewhere; that it does not apply, if the judge who has jurisdiction over the fugitive brings the suit. [ss] Further, property may always be sequestered, and sequestered property may not be released, unless surety has been given that the party concerned will appear in court and that the property will not be dissipated, etc. Where shall the Dutch be sued by the Spanish Ambassador? The Ambassador, who represents the King, seeks justice here, a judge himself of certain fugitives here, and without doubt always a proper person to stand against anybody in seeking sequestered property.

I mention another point against us, [tt] that execution ought not to be sought outside of a territory, if a verdict for the execution can issue against other property in the territory, but to this objection also, if it be made, there is the reply that those who take from other property in a territory must themselves furnish proof concerning it. Besides, and this is the point here, acquisition should not be made by Dutch enemies or others in violation of the law. [uu] It is always true that proscription of property, although it may stand even in the case of those who assist foreign merchants, would especially fail to hold in a territory from which comes the execution for these goods which are held here. But why should there not be a proscription covering all the goods on account of the trading with enemies? [xx] I add here and include the opinion of Imola, explicitly stated, that, when a given place has the power to confiscate, then we must satisfy the verdict of that place by using goods even in another territory quite distinct. And this is the situation before us. Still I do not fail to note that this objection does not arise in this case where the question involves real property. The doctors who could be cited against us do not make this ruling in the case of real property.

a—l. commissa. ubi Ang. Rom. de publica.; Salyc. l. 2. C. de vect.
b—Com. d. l. commissa.
c—Bar. l. 43. de ju. fi. ubi Alex. add.
d—Ias. l. 30. fi. de leg. 1.
e—Duar. de public. c. 3.
f—l. cotem. §. pen. de publica.; Salyc. l. 3. n. 5. C. de na. fe.
g—d. §. pen.; Bar. l. 7. n. 6. C. de ju. fi.; Ang. d. l. commissa.; Salyc. d. l. 2.
h—Torniell. ad. Decia. 1. cons. 8. num. 255.
i—Menoch. cons. 568. num. 13.
k—Bal. Ang. Salyc. d. l. 2.
l—Odd. de rest. q. 82. num. 41.
m—l. 1. C. quae res ex. non de.; l. 4. C. de commer.; l. 1. ubi Baml. C. de lit. et it. cust.; Castr. 1. cons. 445.
n—Bal. l. cunctos populos. n. 180.
o—Bal. l. 4. C. de commer.
p—Carav. sup. ma. cur. ri. 132.
q—Natt. ad Alex. 1. cons. 31.
r—Rui. 3. cons. 48. n. 3.; Ceph. 278.; Scot. 3. lib. 2. to. 2.; Anch. 2. q. 25.
s—Bal. c. 1. de pa. te.
t—Alex. 1. cons. 16. ubi Mol.
u—Clar. §. fi. q. 78. num. 27.
x—Panor. c. ult. nu. 23. de fo. co.; Nav. cons. 1. de consuet.
y—Por. 1. comm. opi. 24.; Viv. Doctori, etc.
z—Burs. cons. 43.
aa—Laderch. cons. 158.
bb—Alex. 6. cons. 19. et lib. 7. cons. 141.
cc—Cujac. lib. 5. de pa. te. Not. 2. tit. 27.
dd—Vide sup. c. 7.
ee—Decia. cons. 283.; Imo. l. saepe. n. 23. de re. jud.
ff—Cla. §. feudum. quaest. 3.
gg—Ceph. cons. 172.
hh—l. 2. 6. 8. de adqu. rer. dom.; l. 5. §. 2. de re. vi.; l. 25. de usur.
ii—Clar. §. fi. q. 82. sta. 5.; Caepo. l. 2. C. pro empt.
kk—Baml. l. 1. de ju. fi. l. 7. de agr. et cens. l. 1. de praed. decur. l. ult. de su. re. pr. [Baml. probably mistake for "Barulo": cf. text. Rubrics misquoted.]
ll—Com. d. l. commiss.; Salyc. d. l. 2.

mm—Ias. l. a divo Pio. §. sententiam. n. 19.
nn—Ias. d. §. num. 3.; Alex. 5.
oo—Covar. pr. 11. n. 10.; Bal. l. 4. num. 6. de justi.
pp—Anch. cons. 102.
qq—Rom. Alex. Ias. l. 2. ubi add. Ias. de jurisd.
rr—Ias. d. l. 2. nu. 17. et ibi add. non.
ss—Anch. Pan. c. ult. de fo. co.; Soc. 3. eod.
tt—Ias. Alex. d. §. sententiam. princ.
uu—l. ult. C. de commer.; Stra. de merca. p. 2. n. 36.
xx—Imo. cons. 35. num. 19.

CHAPTER XIV 61

Whether the King May Rightfully Decide That Spaniards Who Have Been Roughly Handled by the Dutch off a Port of the King May Sail in Safety to Belgium

I think that our King has the undisputed right to let those Spaniards go in safety who have recently been defeated in battle by the Dutch and even attacked off a port of the King and are now held under blockade in the harbor mentioned. Without any doubt this action of the Dutch is in violation of all justice, and of the respect which is due to the harbors and territories of another. [a] Indeed, no light injury is done to a man, if a person is killed or assaulted in his house or in front of it, as Nonius, a teacher of mine, states in perfect accordance with the common feeling of mankind. [b] Consequently, the Carthaginian leader abstained from action against Scipio in the harbor of Syphax, when he was just clearing his ships for action and yet could not have attacked Scipio before he had taken refuge in the harbor, " and no one dared to engage in actual hostilities in the harbor of the king," Livy remarks. Acts which violate a territory and a jurisdiction may not take place in harbors, for, although the use of harbors is open to all, the abuse of them is not permitted to anyone, an abuse which, in the case before us, would involve the violation of jurisdiction and of the common safety.

There is no question of doubt here, nor indeed can the heat of battle excuse the Dutch, an excuse which perhaps somebody may give even on the authority of my own books, in which he may have read the following words: [c] " The anger of the enemy cannot be curbed, nor his ardor cooled," etc. [d] And elsewhere, " unthinking heat is free from crime. A quarrel does not allow time for cool deliberation. A man under the control of intense passion has not full control 62
of his mental powers," etc. These facts do not justify them, [e] for in the very laws we read that anger, even when just, does not excuse a man, except that he is to be punished less for what has been done in anger. [f] In the case of misdeeds, there is no distinction whether they have come from the heat of passion or not, because misdeeds ought never to go unpunished. [g] The great Scipio, mild and ready to pardon as he was, actually punished with death men of his who were to blame for the pillaging of the city of Locha after he had sounded a recall

from the assault. Now the ladders were already against the wall, and the soldiery had not yet heard the signal, "in their rage at what they had suffered," as Appian says. [h] But when the signal for recall was given, the trusty soldier of Cyrus, although he was about to smite an enemy with his uplifted sword, let him go, and quietly withdrew. "He retired in quite a calm and orderly way," writes Plutarch, and he praises this deed recounted in the *Cyropaedia*. Why, [i] "the man who has done a thing which his leader has forbidden, or the man who has not followed his orders, is punished with death, even if he has been successful." And shall the man go unpunished who has not respected the sovereign rights of the realm of our King, and has done a thing forbidden there?

In this case, the Dutchman cannot say, "I didn't see," for everybody who was there *did* see, unless the heavy smoke from the guns concealed from everyone the light of day. The Dutchman cannot say, "I didn't think," [k] for under the law of nations, which is well known to everybody, domains are distinct, and everybody knows that it is not lawful to commit such acts in foreign territory. There is no greater deafness than the deafness of the man who purposely does not wish to hear; no greater blindness than the blindness of the man who avoids seeing. [l] And this was the point in the jest of Marius when he remarked that he "did not hear the law on account of the clash of weapons." The jest was perpetrated; the *bon mot*
63 was made; made, too, was the bold and clever move of the Dutchman who once pursued a hostile French ship all the way to the city of London. And this incident, too, is real enough.

But this is the question before us, whether the Spaniards may ask the King for permission to cross to Belgium, whither they had set out, under his royal safe conduct. Perhaps this question is rather for the Royal Council than one which calls for advice by anyone of us. Now, as I should say, the King can undoubtedly grant the petition, though there is the general remark in the law that [m] "permission does not imply obligation." [n] Many things are lawful that are not expedient; [o] many things are lawful that are not honorable. Our King can even avenge with considerable severity a wrong done to his territory, and if he has Dutch ships under his control, he can detain them until the Spaniards have come to a place of safety, [p] just as Syphax, whom we mentioned, kept back the Carthaginians, who were lying in wait, until Scipio had sailed far enough to sea to be out of danger—"until Scipio reached safe water." The Carthaginians were ambassadors also. [q] Our doctors even teach us that if one has been captured in a place where he ought not to have been captured, he should even be allowed to make his way to a place of security with such safeguards that pursuit would be difficult. This policy was

followed on that former occasion with the French ship mentioned above. She was allowed to go in advance of the other vessel during one entire ebb and flow of the sea. There is a great similarity between these cases, and the line of reasoning involved is similar.

[r] The blockaded man is a man held captive and is so styled. At the present moment the Spaniards are blockaded here where they ought not to have been blockaded. Consequently, they ought to be set free and allowed to go. The Dutch have no defense in the word "blockade," and the smoke furnishes them no valid excuse, for this reason, not to mention others, because in all cases the sovereign right of jurisdiction is defended and vindicated if violated. [s] It would be a wrong to us, I repeat it, if in our house a person 64
should be taken prisoner and therefore it is a wrong if a person is blockaded.

[t] It is for the Prince too not only to guarantee that people live securely and safely everywhere in his territory, but without doubt it is for him also to punish offenses committed against all others as well as against himself. [u] Now, there are several cases when one party deals with another, that the second party may deal with a third. "I take action that you may take action," as our saying goes. For this reason, then, the Spaniards will bring action before the King, if Princes owe security under the common law to everybody in their realms. Furthermore, our King owes it to the Spaniards under the special legal right which the recent peace established. In the case before us the Spaniards have been wronged by being attacked off the harbor; in the case before us they are suffering injury by being blockaded in the harbor. They are seeking redress; they are asking a friendly and allied King, who did not have to be injured and yet was injured, to punish the deed. This happened within the jurisdiction of the great Admiralty. [x] Consequently, a serious offense has been committed against its jurisdiction. Action is not brought to have the King help one ally against another, but to have him prevent the use of any violence upon one by the other within the King's jurisdiction, [y] although the doctrine has been handed down in a parallel case involving allies, that one should be defended against the attack of the other.

But it is not real redress, if, as I hear proposed, these Spaniards are taken back to Spain, for this is what the Dutchman would like, and he would pay a high price for it. He would even build a golden bridge for the fleeing enemy, as the saying goes. [z] Redress is that which pains, not that which pleases. Redress should hinder, not help. But it would help the Dutch to have the Spaniards sent to their distant fatherland, to have them removed from this convenient place where they could stay and from which the completion of their

journey to Belgium would be easy. [aa] The redress, too, which is the more feared, should be adopted. Now, the only fear the Dutch have, is that the Spaniards may be sent to Belgium. [bb] The redress ought to fit the offense. Now, the Dutchman has offended in hindering the Spaniards *here*. Therefore, he should be punished by helping them *away from here*. [cc] If he cannot be punished in a way to fit the crime, let him be punished in the opposite way. Justice would have been done without giving ground for righteous indignation, if a man suffers what he does not wish when he does that which he ought not to do.

But I hear the parallel case cited of the King of France, who sent Spaniards back to Spain not so long ago; he did not send them to Ireland, whither they were sailing at the time, as enemies of the English. I am not so sure that this is a parallel case. Indeed, if the English committed no crime against the territory of France, then it would not be a parallel case, nor one of the same nature in any respect with the present situation of the Dutch. Look at the countries, too. It just suited the Spaniards in going to Ireland to be sent back from France to Spain, for that would be the direct route from Spain to Ireland.

But for those who are on their way to Belgium, and are in sight of Belgium, and can reach the friendly shores of Belgium in four hours with a favorable wind, even against the will of the Dutch, to be sent back from here to Spain, what else is that than to pile injury upon injury in the case of people whom it would be more fair to help?

This is what I think, if only the King approves. With him it is left to decide, as I think, what punishment he would exact from those who have violated his territory and how satisfaction should be given to the injured Spaniards, [dd] whom the Dutch could not lawfully harm anywhere in the territory of another against the will of the ruler of the territory.

a—Non. cons. 108.: Schurp. 2. cons. 57.
b—Liv. lib. 28.
c—Alb. 2. de ar. Ro. 10. et 3. de nupt. 8.
d—l. 1. ad Turpil.: Fely. cons. 50.
e—Clar. §. fi. q. 60.
f—Bal. l. 5. C. de inj.
g—App. Punic.
h—Xenoph. 4. Cyrop. prin.; Plut. comp. Pe. & Ma.
i—l. 3. de re. mil.
k—l. 5. de just. et ju.
l—Plut. apoph.
m—l. 4. de jud. ubi Castr.
n—c. 8. c. 9. 28. q. l.
o—l. 197. de reg. jur.
p—App. Hispan.
q—Rom. l. 18. de in jus [illegible]: Fely. c. [illegible]

r—Alb. Mac. 4.

s—Dec. cons. 189. nu. 17.

t—Deut. 21.; Sot. 1. de ju. 1. a. 4.; Caepol. de se. ru. 4.; Gail. 2. obs. 64.; Schurph. 2. cons. 2.

u—l. 2. ubi. Salyc. Fulg. Pete. de le. Rh.; Ang. l. 2. ne quid in lo. pu.; Castr. l. 26. de fidejus.; Bal. c. 4. de coha. cler.

x—Cow. inst. ju. Angl. tit. ult. §. 22.

y—Alb. 3. de ju. be. 18.

z—Decia. 3. cons. 19.

aa—Io. R. c. 13. de vi et ho. cl.; Zab. prooem. decretal.

bb—Alb. 2. de lega. 21.

cc—Damas. reg. 126.

dd—Alb. 2. de ju. be. 22.

66 CHAPTER XV

Of the English Who through the Assistance of the Treasury of the King of Barbary Have Bought Property Taken from the Spaniards by Pirates.

[a] The opinion is correct which I gave in commenting on the constitution of Zeno, that it is speaking of the fiscus of one's own Prince, that is, the Prince of the man whose property is at stake, for all who give an explanation of this law take it in this way, that the Prince may take from me the ownership of my property. Now, surely this is not true of a foreign prince. The laws are speaking of the Prince and they certainly do so only with regard to his subjects. [b] Furthermore, when the doctors say that the treasury spoken of is present everywhere, they are likewise speaking of the treasury of one's own Prince, for the treasury of another Prince would have no existence here. Consequently, in realms distinct from one another that law would not apply.

Now, as to the fact that the law gives redress against the treasury, the Spaniards have no redress, at least against the fiscus of the King of Barbary.

Besides, this law does not apply where there is bad faith on the part of the buyer, as Baldus quite correctly observes on that point in a supplementary note—Fulgosius holds the same view—whatever Baldus may write on the other side in his first two treatises. [c] Others speak also of the good faith which the buyer ought to show, and they mention other qualities too which must be assumed in order that this constitution may stand: that the Prince should have come into possession and in good faith, [d] as, again, others too remark; that the buyers should be of good faith on their part. But the English have bought some of these goods directly from the pirates and they knew that they were buying from pirates. [e] Still the fact would have been enough, that they ought to have known it. They knew too that what they bought there through the intervention of the fiscus was booty left by the pirates, for they saw these very pirates there,
67 and knew that all of the property must have come from the pirates, and they recognized the same marks on all the chests. Let the judge observe the bad faith of these merchants, who, when summoned here to court, took pains to have these marks, which indicated the owners, rubbed out and effaced, and were caught in the act. [f] The man who

robs his adversary of proofs is guilty of trickery. Consequently he has admitted his evil intent. [g] He shows that he is supporting a dishonest cause, etc.

[h] But that constitution of Zeno is vexatious, unjust, in violation of natural law, in violation of the law of nations; it deprives the other person of the right of ownership. Therefore its application ought to be restricted so far as may be, and everybody should always refuse to recognize the law, etc. [i] But it does not hold, unless many accept it; and many limitations are applied to it. [k] That point is much discussed which concerns the peculiar privilege granted by the law to the Emperor, as Panormitanus says, a privilege not to be extended to the King of France. I shall set up that limitation against the King of Barbary, for he does not recognize or hold any part of this Justinian law, [l] whatever may be said to the effect that in the Turkish Empire the highest regard is paid to this Justinian Code and the greatest weight given it in decisions there. In the case of other Kings there is no situation of this sort, for their law is not inferior to that of the Emperor, very often it is even superior.

I will not add several other rather commonly accepted points which could have been added, because I do not wish to dwell longer on a point that is clear. Still I will not fail to say that, even if they had bought from the public warehouse and from public officials, it does not follow from that fact that the purchase was made from the fiscus. The purchase was made there, as the merchants themselves report, in accordance with the practice of that kingdom. This would mean that the King should buy everything and that everything should be bought of the King, as the owner for the moment, and through some agent of his. 68

[m] But the fiscus is bound to sell property as its own, honestly, not with an ulterior motive, if the buyer is to be safe at once. Besides, this sale of the fiscus must be effected through an agent especially deputed for the purpose, as Alexander states in his opinions. It is far from true that this sale, informal and nominal in its character, is enough. The steps mentioned above ought to have been taken and approved; yet they were not taken, nor have the merchants maintained that they were. Consequently the solid foundation based on the sale by the fiscus on which the advocates on the other side rely without reason gives way. Menochius reaches the same conclusion in a case in which he gave an opinion, in discussing the same fundamental argument raised against him.

Furthermore, in our case I would add that, if this legal principle is set up to govern the treasury of that land, the pirates will have indicated to them a very convenient place, which is quite close to the Spanish lines of trade and occupied by English merchants, where

they may distribute their booty among their confederates. Does this make for trade?

a—l. omnes. C. de quad. praes.
b—Cy. Alb. Bal. l. 1. C. de quad. praes.
c—Menoch. cons. 2. nu. 333.; Odd. cons. 99.
d—Rui. 1. cons. 46. et lib. 5. cons. 31.; Balb. de praesc. p. 5. pr. in. p. 2. q. 8.
e—Non. cons. 89. nu. 41.
f—Menoch. de arb. cas. 381.
g—Dec. 3. cons. 62.
h—Pan. 1. cons. 3.; Non. d. 89.; Menoch. d. 2.
i—Ceph. cons. 634.
k—Crav. cons. 263.
l—Scip. Gent. Orat. de le. reg. ex Leuncl.
m—Alex. 7. cons. 52.; Baml. C. de vend. re. fi.

CHAPTER XVI

Of the Edict of the King, Binding Those Unaware of It

In times long past the question arose as to whether booty captured by a general of the enemy after the sovereigns had signed a treaty of peace really became the property of the captors, provided that the generals did not know of the treaty. This same question arose and was again discussed shortly before this present generation, and now it is before us.

[a] Now, my contention was that the booty could not have been captured, or rather have become the enemy's who captured it. And as it appears to us now, that question is quite idle for the following reason: Clear and unmistakable stands the edict of the King, by which any hostile action against the Spaniard is forbidden after April 24, and after that day this capture of booty took place which 69
has now come up for judgment. And although the opposing side might urge a very probable ignorance of the edict, since they were far away from here on the high seas, still, even without the edict and in spite of their utter ignorance of it, the same principle of law seems from our discussion mentioned above to hold good, and therefore the same necessity of restoring the booty exists. [b] For, though the saying is current that the law is binding after two months have elapsed, and that in consequence positive law may with impunity (as it is aptly put in the *Burchardica* of Damasus) be ignored for two months; [c] nevertheless the judge may decide at his discretion when the law becomes binding. [d] Now, the sovereign certainly had the power to bind those unaware of the law, although no moral blame or penalty would be attached to them. [e] Then, too, it was his intention to bind those unaware of the law, since he indicated a day after which men should be bound under it. This is the common view. We are speaking now of an obligation that has no penalty attached. [f] Those unaware of the law are not bound under penalty by the comprehensive terms of a statute taken in their fullest sense, for these should the rather be narrowed in their application. Knowledge following the deed does not lead to punishment; even knowledge presumptive because general is not enough to bring the penalty even upon a person in the place where the knowledge is general. Knowledge in civil cases does not prejudice an absent person in any way. Other statements to the same effect are found in the commentators, but they

are all superfluous in our controversy, since the King's edict is seen to be clear regarding the time, and likewise regarding the civil responsibility imposed upon those unaware of the edict. The King had the power to make the law operative, not after several months, but at once, [g] as Menochius recently decided, and he went fully and in detail into this discussion of the time within which a law is binding upon subjects.

The more difficult question remains for us of deciding how we are to take the words of the edict and of the treaty which com-
70 mand that account be taken of what is captured after that day. We must examine the words as found in the treaty recently made with Spain, since the King's will is less carefully expressed in the edict. [h] Now, perhaps these words mean that answer must be given in court and that these subsequent captures must be justified. This is the sense in which Decius and Ruinus understand the article of the agreement between the Genoese and Savoyards, in which it is stated that the Savoyards are bound to give account at Genoa, and this they maintain means to submit to trial at Genoa. And truly what else can the words mean? [i] To render account is to balance receipts and expenditures, not merely to pay the difference, which may be nothing. The words by no means appear to condemn. [k] "Account" in this connection would imply "discriminating examination of the motive and justification of the act performed." Thus others put it. And this discrimination would point to the discretion of a good man, and the account would be such as would not suffer the act to be nullified. [l] Then, too, they express the opinion that "answer" would mean "to appear," not "to pay." [m] Again, theologians in commenting on the saying, "They shall give an account of every idle word,"[1] explain that it is really not the same as the other one, "Depart, ye cursed,"[2] and that the fault permits of atonement. [n] And further, the words of the peace articles would be rather numerous and obscure, if their intent was that booty captured after the day mentioned should be arbitrarily returned.

Now, with reference to the articles, I consider three cases here: First, where the act occurred prior to the day fixed; second, where the act occurred after the day when peace was concluded; third, where the act occurred between these two time limits. In the first case I see the privateers in perfect safety; in the second, in utter insecurity; in the third, which is our case, in utter uncertainty. Thus the articles prescribe that after the conclusion of peace no booty at all be taken, which is the second case. Thus they prescribe that nothing done before the appointed day should be brought under the law,

[1] [*St. Matthew,* xii, 36.]

[2] [*St. Matthew,* xxv, 41.]

which is the first case. But if the third case is not the same as the second mentioned—and it is not, unless it is superfluous—it would undoubtedly deal with the uncertain, as I said, and as the words 71
themselves, I maintained, indicate.

But now, if this case falls within the sphere of the uncertain, then it will be the judge's duty to decide what regulation should be adopted regarding restitution. [o] For even though the sovereign should order that anything attacked after a fixed time should be left unchanged, yet this is understood of unjust attack merely, and therefore if the judge shall here consider the justice of the deed, the action will not be canceled at once. The judge will take into consideration the fact that, though these acts were done in the name of the state, yet the expense was private and the advantage private; and also that further expense has been incurred to secure pardon for waging this sort of warfare, so that this case is not on a par with that one concerning which I have spoken elsewhere, as I said in the beginning. And undoubtedly the King will desire to interfere less with these private individuals than with his public servants in general.

He will perhaps be unwilling to take the fruit of their toil and expense from men who had not heard of the edict, since he did not make the law binding on them until after the day when peace was definitely established. Let the man who maintains that the law is binding on those ignorant of it prove this from the words that account must be rendered of acts committed after that twenty-fourth day. This day concerns them, I admit, and likewise an obligation is imposed, but what is this obligation? Here we have a capture. The law says there is an obligation to give an account, it does not say to give back the property. No obligation beyond the one already fixed should be imposed upon those who had not heard of the edict. Of course, their ignorance should be examined to see whether it is only pretended, whether it is blameworthy, etc.; [p] for although a law is not as a rule binding on those who do not know of it, still there are numerous cases where it does bind them, [q] just as on the contrary the provisions of a statute are not binding on those who with reason are believed not to have known of them. Now, these are the considerations which make me hesitate on that question about the wording of the peace articles.

a—Alb. 3. de ju. be. 17.
b—Non. 66.; Alb. c. data. de reg. ju.; gl. c. 2. de consti. Dama. reg. 1.
c—Anch. c. 1. n. 227. de const.
d—Oldr. cons. 313.; Zab. c. 2. de constit.; Ias. l. 19. de lib. & po.; Nav. cons. 1. de constit.
e—Navar. cons. 32. tit. 13. lib. 3.; Gabr. 6. concl. 4. de Leg.; Zab. d. c. 2.
f—Crav. cons. 6. 319.
g—Menoch. de arb. cas. 181.
h—Decia. cons. 359.; Rui. 4. cons. 1.
i—l. 32. 50. 81. 82. 111. de cond. et dem.

k—Paris. 2. cons. 12.; Decia. 7. cons. 70. num. 6.
l—Alex. l. 1. de in jus voc.
m—Bellar. 1. de amis. gr. 9.
n—Aret. 2.
o—Ias. l. 14. n. 18. C. de jud.
p—Decia. 1. pr. 35.
q—Alc. 2. cons. 33.

CHAPTER XVII 72

On Various Questions, Addressed to the Illustrious Jurisconsult, Robert Taylor

You ask me, honored sir, to tell you in a word what the law is in the questions which you lay before me, not because I am the more learned, but because I am a less busy man than you. [a] I reply that the most commonly accepted view is, that in criminal cases a judge may not admit the defendant to bail. There is no doubt at all concerning this view in the case of more serious crimes, whatever Menochius and Suarezius may say to the contrary. [b] Those who have committed a serious crime are not released on bail, as the law itself says. Yet this law puts it at the discretion of the judge to decide what constitutes a serious crime. [c] But if even a slave charged with a capital offense can be admitted to bail, the privilege has to do with chains from which he may be set free by bail, but he may not be released from prison. [d] Chains are a very different thing from imprisonment or confinement, Duarenus says on this point. As to the use of chains, that is, as to imposing them on a slave and requiring him to plead his cause in them, it is a special practice in the case of a slave, [e] as other writers note from a study of this law. Menochius is wrong in attacking Angelus on these points. [f] The other law, which does not require the holding in custody even of those who are without bondsmen, gives no indication of the practice for the more serious crimes. But the practice will be made clear by what has been said above. So much on the first question, and set forth a little more fully, I think, than you wished.

On the second point, with reference to the meaning of the words "about to take care" (*daturos operam*), which are given somewhat briefly in the peace articles, [g] "to take care" means to desire, to strive, and to look after. [h] Sallust remarks aptly on the well-known decree of the senate that the "consuls should take care" (*darent operam consules*), that by this measure unlimited power is granted, so that we may therefore assert that in this case we have the greatest care 73
guaranteed by the direct promise of kings, as well as by the binding nature of society, to which this contract embodied in treaties is similar and of which it is a part. [i] He who promises that he will exert himself ought to act in good faith, so far as is in him. He ought to exert himself with all earnestness without being solicited to

do so. [k] A prince ought to do this even to the extent of using armed force. This on the second question.

On the third question listen to what Imola says: [l] "You must conclude that, if a man has won a civil suit, he will undoubtedly be able afterward to bring a criminal action." Listen to the marginal note also: [m] "All agree that, if a plaintiff has won in a civil case, it is a clear and established fact that a criminal prosecution may follow." This third point is not open to question, if the case is one in which civil action has been brought and sustained to recover property, not to inflict punishment, as all the writers explain in harmony with the gloss.

In the fourth question, whether a man born in Holland, if his father were naturalized here later on, should be regarded as a subject here and not allowed to protect himself by Dutch letters of marque in the matter of booty taken from the Spaniards, I reply that he is not allowed, for the citizenship spoken of, obtained here by the father, as stated, would pass to the sons. [n] Bartolus, too, held this opinion, when this question was raised by an actual occurrence, and other writers follow Bartolus. Under our law citizenship would pass to the sons, even if no mention is made of them in the father's naturalization papers, as these writers teach. [o] This is the case, even when the son has not yet given his consent, as Baldus says, whatever other writers may say in opposition on this point. I maintain that this Dutchman, at least, is held as a British subject because of his own domicile here, [p] which makes a man a subject more than does either a contract or a delict. The domicile, above all things, determines the jurisdiction everywhere.

The fifth question is whether Brukus, without depositing the money which he has been condemned to pay, may be allowed to appeal. The edict of the King forbids this in the case of pirates.
74 But this man urges insufficient means as his plea. Who should prove his insufficient means? Brukus himself. [q] Castrensis was wrong in not putting this burden on Brukus. But if he has insufficient means, is he excused? [r] Let his body pay the penalty, as the rule stands in the case of a man brought to trial for a misdeed, who cannot pay the fine. This is the practice, and it is a good one, as Baldus says. Therefore, it is allowable in this case not to demand complete proof, [s] if the man who is required to furnish the proof should say that he is poor, because [complete proof] in a way would be impossible, since we should be dealing with a negative situation. And, therefore, the opinion expressed by the neighbors is enough, or the oath of a pious man is enough, etc., and yet this man is not of that sort. [t] If it were not a criminal case, he might be excused from making this deposit on the score of insufficient means.

a—Bero. c. 7. n. 111. de constit.; Menoch. de arb. cas. 303.
b—l. 1. 3. de cust. reor.
c—l. 2. de cust. reor.
d—Duar. de cust. reor. c. 2.
e—Clar. §. fi. q. 46. num. 8.
f—l. 6. C. de app.
g—Rebuff. l. 53. de V. S.
h—Salust. Catil.
i—Alb. 3. de nup. 14.
k—Alb. 3. de ju. be. 18.
l—Imo. l. 4. de pub. jud.
m—Gl. C. quando civ. act. crim. praejud.
n—Bart. l. 6. 17. ad municip.; Rui. 1. cons. 227.
o—Bal. ad Spec. de feud.
p—Gl. c. de fo. comp.; Bal. rub. si a non comp. ju.
q—Menoch. 6. praes. 25. n. 14. 15.
r—Aret. l. 13. solut. matr.; Bero. c. quae in eccl. n. 112. 113. de constit.; Bal. c. 4. de off. del.
s—Oldr. cons. 277.
t—Menoch. de arb. q. 70. n. 33.

CHAPTER XVIII

Of an Ambassador Acting for the Subjects of His King

The objection has often been raised that an ambassador cannot manage the cases of his King's subjects, and people add that the [a] lowly task of managing lawsuits belongs to the deputy, but is beneath the dignity of an ambassador. [b] An ambassador, they say, should have nothing to do with business affairs, whether his own or another's. But our position is this. Accursius and others do indeed call the office of deputy a burden, [c] and certain individuals characterize it as a lowly and disreputable office, but the law appears to make this statement of the deputy with reference to his business duties, not with reference to lawsuits. Then in other cases too that objection does not hold. [d] Well, is it not a high honor to be the deputy of a sovereign? Even the King's notary is in high honor, although
75 the notary at other times is an insignificant person. [e] Whatever is imposed by the sovereign is a high honor. Mark the ennobling law, says Andreas de Bamlo. [f] Then in the case of learned deputies, when they even have a college, the reproach is unmerited.

[g] Well, are ambassadors not nuncios? [h] Are they not holders of a trust? Again, the ambassador in this case fills the office of deputy in precisely the same way as a sovereign, even the highest, does when he appoints a deputy and does not appear at the bar in person. [i] In this way "the task does not make a heavy demand," and the ambassador could perform it. Even before the suit is entered he can appoint a deputy, who by no means has to come into court, and who has this privilege because he has not become the owner by attesting. Why are these objections raised to a deputy with such an honorable commission? Is the commission demanded? [k] He is not forced to show it. But I show from the law [l] that a sovereign is in duty bound to defend and care for his subjects and their property. Therefore his ambassador too would be bound to take this care of his sovereign's subjects and the property of his sovereign's subjects, since the ambassador stands in the place of his sovereign.

[m] Further, I have shown in my books "On Embassies," and others following me in this field have shown, that these private interests too come under the care of ambassadors. [n] Besides, an ambassador just like anyone else can intervene here in the defense even of property, and to the extent of taking the matter into court; here especially,

when there is no one to defend the cause of his sovereign's subjects. [o] Now, with reference to taking action against a plunderer—and practically all these suits are against plunderers of Spaniards—we have this title: "That it may not be lawful for the powerful to give their support to litigants or to transfer the actions to themselves." [1] The other title, "On alienation to change the venue," [2] is in abeyance here, because there is no intent to deceive in this case, where the ambassador must either interfere or permit the property of his 76
prince's subjects to be appropriated and snatched away before their very eyes, although the control of this property is of the greatest importance to the prince, since it is greatly to his interest to have wealthy subjects.

[p] The ambassador may go to law to recover losses, to prevent anticipated wrong, or to protect a ward, and here it is a question of the losses and wrongs suffered by the ambassador's fellow countrymen who are in the nature of wards because absent and who have, owing to their absence, even less power than wards. If it is a question of guarding property, the ambassador has all the more right to interfere, [q] for what prevents the ambassador from discharging a public trust and being the attorney in possession of property in order to protect it? [r] And that in spite of the opinion handed down that governors of provinces are dealt with in the titles of the laws and in that passage where it is written that they shall not become involved in any disputes, whether their own or another's. But the laws are not speaking of these independent and powerful personages residing abroad, [s] for they were not even known until just recently. In most points, of course, as I have also said elsewhere, those governors of provinces are comparable with their powerful successors, but this parallel must not be pressed too far. The latter are not under the laws which apply to subjects as were the governors of provinces. They are responsible to their sovereign alone, and to him, and him alone, they have to give account of all their doings as ambassadors. In cases of the King's fiscus, as the question was once handled here, the ambassador will undoubtedly interfere, [t] since anyone can look after the interests of the fiscus. Further, this would be his sovereign's own cause. In this way an ambassador could prosecute a man for an act of piracy committed against the subjects of his King, even though these same persons had gone to law with the pirates on the charge (and this was the question), and had them convicted in a civil process. [u] Of course, any subject whatever who had not gone to law could do this, and this cause would be likewise the King's own in accordance 77
with the terms of the treaty.

[1] [*Code*, 2, 13.]

[2] [*Code*, 2, 54; *Dig.*, 4, 7.]

a—Bal. l. 1. de post.; l. 6. C. de bo. quae li.; Hond. 1. cons. 81.
b—l. 8. §. ult. de legat.
c—l. 34. ubi Baml. et Bart. C. de decurio.; Mantu. dial. cl. 9. c. 30.
d—Natt. cons. 428.
e—Baml. l. 5. C. de dign.
f—Laderch. cons. 182.
g—Alb. 1. de leg. 2.
h—Kirch. 1. leg. 1.
i—l. 30. ad Trebell.
k—Paschal. lega. c. 51.
l—Maria. Soc. cons. 60.; Alb. 1. de ju. be. 23.
m—Alb. 3. de legat. ult.; Paschal. leg. c. 52. 53.
n—DD. l. ult. vim.; Ias. l. 7. §. si satisdatum. num. 17. qui sa. cog.
o—l. 1. C. si per vim vel alio mo.; Bal. marg. spoliatus.; Mantu. dial. p. 2. cl. 17. c. 18.
p—l. 2. §. 5. de judi.; l. 9. 10. 11. de legation.
q—l. 27. de judic.
r—Kirch. 1. legat. 2. num. 11.; Cuja. 22. obs. 22.
s—Alb. 1. de leg. ult.; Lips. 4. misc. ep. 81.
t—Bar. l. 1. de jure fis. et ibi ad Mangr.
u—DD. l. 18. C. de transact.; Decia. 3. pr. 34.

CHAPTER XIX

Of Punishing the Fault of a Magistrate

We say [a] that fault is not taken for granted unless it is proved. He who charges it must furnish clear and certain proof. Nay, rather, to avoid the suspicion of imputing blame, a man is presumed to have done what a person in his circumstances would probably do. [b] In the case of officials, diligence is especially taken for granted. We take it for granted that officials have done their duty with diligence and fidelity. The law makes this presumption for the benefit of officials, and favors them. Every meticulous investigation directed against them is forbidden.

These are the facts. [c] But this point holds against officials, that they must themselves prove that they have been honest in office. The law says: "It is not necessary for a ward to prove that the trustees appointed to act as guardians were not suitable persons, when they were accepted as guardians, for the proof should be required of those whose duty it was to see to it that the interests of the ward were safeguarded." The doctors say that this is so because officials have to prove that what concerns their office was honestly done while they were in office.

Or, if you should say that there is official responsibility in the case of the ward who could not look out for himself, you would say it the more in the case of the foreign ship belonging to the Lusitanians, the ship which, since it was brought under the control of an official, could not look out for itself in choosing suitable guards. It is this matter of unsuitable guards which is urged against the Vice-Admiral. Again, even if you wish, in common with the other doctors, to have the burden of proof in this matter rest on the magistrates,
since in the light of the present situation, when they are evidently 78
not suitable guardians, we assume that they were not suitable at the time of appointment, this consideration also counts strongly against our official, whose guards have not been found suitable in point of fact. [d] So we reply to that general presumption in favor of officials mentioned above, that it holds if there be no other special presumption on the other side. [e] In the present case I say, concerning the guardians, that even a mischance is presumed to have occurred through the fault of those who were bound to keep guard. Upon them too falls also the proof that it was a mischance, since they in

view of their duty to do so ought to keep guard. This is true in the case of any guard whomsoever. [f] It is true too in the case of any official whomsoever when a thing has been done in violation of the duties of his office. [g] The guard is also responsible for the slightest error, that is, for the most perfect diligence in taking the necessary precautions. The man who says that he has shown such diligence must prove it, because it is not ordinarily found, [h] and the fault involved is not avoided without trouble. [i] Furthermore, all the laws and commentators hold that public officials, even in their relations with private citizens who have been injured, are held for the slightest possible fault under the civil law and even for a mischance which follows a fault; that they are held for any negligence "whatsoever" which injures a party, [k] that is, even for the slightest negligence. [l] Guards are held responsible for robbery; they are held responsible for an escape; they are held responsible for a loss inflicted by others; or they should prove that it is no fault of theirs.

Again, these guards of ours should show how they were driven by the Dutch from their charge and from the possession of the ship without any fault on their part. No battle is mentioned, and the defense would have been very easy in that place where these very Dutchmen had been made prisoners without any trouble a little while before. Or if any violence has been offered, would not the Vice-Admiral have punished the Dutch, as his duty, as the wrong done his men, as the wrong done to himself required? He is not excus-
79 able if he says that he could not punish them, provided he could have got enough aid from the neighboring town, the town from which the Dutch had been taken before, or from some other place in the vicinity. [m] These principles are laid down by those who comment on the power of officials. Likewise they state that merely by means of the letters of officials which must be accepted and obeyed, an official may get help. Well, has he never been able to accuse those who broke the peace? [n] He who has failed to take action against a manifest crime, is not free from the suspicion of secret complicity. [o] The man who fails to punish is a partner in crime or an instigator of it. You would talk nonsense if you should say that the Vice-Admiral has not heard from his own men or from others of this act of violence. By presupposing such silence you would put his men in the attitude of open treachery, [p] and indeed, guards themselves sometimes steal, wherefore the satire says, "who shall guard the guards themselves?" [1] [q] Then their negligence, as well as their treachery, might have injured the owner. Therefore, if the Dutch did not board the ship by an open display of force, but crept on board secretly at night, there was great negligence on the part of the guards, "who

[1] [Juvenal, 6, 347.]

did not keep the watch that night."[1] [r] They have not done what everybody on board ship is wont to do, at least what all guards are wont to do and ought to do, and especially, guards of such a sort as ours are, who are stationed to prevent these very predatory raids that threatened them. [s] But they are guilty of treachery who fail to do what they are in duty bound to do, and what others have been accustomed to do.

This rule holds whether they know or should know that they ought to act. The law says: [t] "There can be no excuse for a shepherd, if a wolf has devoured his sheep, and the shepherd does not know." It says, "there can be no excuse," [u] and it calls attention to the unconditional obligation even in the absence of the ability to meet it. It says, "he does not know," [x] so that he is responsible, since his ignorance of what should be known is thought of as pretended, and, therefore, is regarded as knowledge. [y] Negligence is 80
proved in various ways, for instance, when a man is held to the performance of a certain act within a fixed time and locality, [negligence is proved] by the very fact that this action has not been taken. Now, we have to do with such an action. [z] The negligence of the guards is like treachery. [aa] The negligence of the Vice-Admiral himself is established, who, on going away, did not leave another person to keep proper guard. [bb] We have proved treachery even in the case of the man who does not do what he ought to do, the man who has not applied the requisite remedies. Who would not criticize in this case both the guards and the Vice-Admiral? [cc] He will not be excused, even if he had shown the usual diligence in matters of this sort, for in this case the proven robbers near at hand made the danger greater than usual.

a—Decia. 1. cons. 29.; Ceph. 66.
b—Eug. cons. 60.; Ceph. 359.; Menoch. 622.; Dec. 1. cons. 2.; Gramm. cons. crim. 24.
c—Fulg. l. 11. de pro.; Com. l. 1. de mag. conv.
d—Menoch. 2. praes. 85.
e—gl. c. pe. de reg. ju.; Alc. 3. praesum. 15.; Ceph. cons. 362.; Turz. com. opi. 385.; Corn. 1. cons. 273.
f—Menoch. d. c. 85.
g—Ias. l. 61. de Leg. 1.; Alex. 1. cons. 50.; Alc. 8. cons. 20.; Menoch. 118.; Rip. ult. de pes. 2.
h—Ceph. cons. 640.
i—Anch. cons. 121.; Menoch. 246.
k—Rebuff. l. 164. de V. S.; Menoch. cons. 335.
l—Fulg. de off. pr. vig.; l. 21. de rei vi.; l. 40. loc.
m—Saly. Fulg. l. 2. C. de his, qui latr.
n—Anch. cons. 337.
o—Bal. l. 2. C. de commerc.; Giacch. add. Clar. §. fi. q. 73.
p—Fulg. de off. pr. vig.; Menoch. 5. praes. 31.
q—l. 23. pro. soc.; Ias. l. 35. si cer. pet.; Fulg. l. 8. mand.
r—Stra. de naut. p. 3. num. 33.
s—Bertra. cons. 136. vol. 1. p. 2.; Menoch. 121. 175.; Ceph. 265. 388.
t—c. ult. de reg. ju.; Alc. 8. cons. 20.

[1] [*St. Luke,* ii, 8.]

u—Ias. l. Gallus. princ.; Ceph. cons. 235.
x—Rip. l. quod te. Si cert. pet.
y—Bar. cons. 102.
z—Decia. 2. cons. 46.
aa—Castr. l. 12. loca.; Ceph. d. 640.
bb—Menoch. cons. 118. 406.
cc—Anch. d. cons. 121.

CHAPTER XX

Of an English Ship Sailing to Turkey with a Quantity of Powder and Other Merchandise

If this question were raised in our country, as the advocate here in ordinary of the Spaniards, I should either argue for the Spaniards or say nothing for the sake of truth. But the question at issue is being examined in Spain, where it is surely not unbecoming on my part to publish something written by me in defense of my English friends, whether this count against the Maltese or against the Sardinians, when even the Spanish ambassador here, Pedro de Zúñiga, a man noble, eminent and distinguished for all the other virtues, sent to Spain a commendatory letter in behalf of these same Englishmen.

The facts are that an English ship, laden with a little powder, a 81
small amount of similar equipment, and much other merchandise, when on the way to Constantinople was captured by the Sardinians and Maltese. The English are now complaining of the wrong, and they ask me if they are justified in their complaints. I, because of my slender ability, though after considering all the points carefully, at first decided that all the laws, civil, canonical, the law of nations, and the law governing contracts apparently cried out against the English.

These are the civil laws: [a] " Let no one have the power to transport wine, oil, or any liquid to heathendom even to give them a taste, to say nothing of satisfying the demands of trade." " Let no one dare to sell to alien heathen [. . .] coats of mail, shields, bows, arrows, broad-swords, swords, or arms of any other sort whatsoever. Let absolutely no weapons be retailed to them by anyone, and no iron at all, whether already made up or not, for it would be harmful to the Roman Empire, and would approach treason to furnish the heathen, who ought to be without equipment, with weapons to make them stronger. But if anyone shall have sold any kind of arms anywhere to alien heathen of any nation whatsoever in violation of the interdicts of our holy religion, we decree that all his goods be straightway confiscated, and that he too suffer capital punishment." [b] To this effect are the other civil laws and their expounders. They forbid the doing of that, which in the present case is said to have been done by the English, for no Christian will deny that the Turks are heathen. [c] " Today by serious-minded men people who are not of

the Christian law are considered heathen," says Alciatus. [d] Besides, these Turks are heathen for every other reason; they are alien heathen, whom the law has in view, that is, they are not subjects of the Empire, for some heathen are subjects. Therefore, the civil law, which apparently can be today called the law of nations, and has a common relation to all Christian nations, is to the effect that it is
82 expedient that the Turks be in want and not rendered more powerful.

Now the canon law: [e] " Such an insatiable greed has filled the hearts of some people that those who glory in the name of Christian are furnishing the Saracens with armor, iron, and helmet straps, and become the equals of the heathen, or even surpass them in wrongdoing by furnishing them with arms and necessaries for fighting the Christians. There are people even who in their greed act as captains and pilots in the galleys and piratical ships of the Saracens. Such people, therefore, we decree have been cut off from communion with the Church and excommunicated; they are to be deprived of their goods by Catholic Princes and to be made the slaves of those who capture them." These and other decrees found elsewhere belong to the same law. For instance, " we excommunicate and anathematize those faithless and impious Christians who against Christ himself and Christian people furnish the Saracens with arms," etc. There is no doubt that this is to be taken of the Turks also. Even the Saracens are Turks: [f] " The Saracens handed over the headship of their Empire to the Turks on condition that they should give up idolatry, adopt the creed of Mohammed, and be initiated into the rites of the Saracens. This request was readily granted by a people who were heathen and very eager for the honor." Why shall I speak of other constitutions of pontiffs who followed? They deal with Turks and with heretics. Thus canon law expresses itself in lines of reasoning which are truly catholic, if it behooves no Christian to aid the enemies of Christ. Now, to carry these implements of war to the Turks would be tantamount to arming them against the common Christian fatherland, against all our Christian brothers, against Christ himself, the head of us all.

Furthermore, in like manner the law of nations would seem to be against the English, [g] as I have myself apparently proved by maintaining at length in my books " On the Law of War," that it was not lawful for the Hanseatic cities to furnish to the Spaniards supplies and that which is usually of service in war, when the Spaniards were ene-
83 mies of the English. In that connection I reach this conclusion: " The arguments which I made in behalf of the English, I make now both against the English and against the others who at the present time during the war between the Emperor and the Turk would take warlike supplies to the Turk. Do not unto others what ye would not

that they should do unto you. [h] This rule is nature's own and a per-
fect pattern of the law of God and man." This rule holds here where
others are bound by the precept not to do this disadvantageous thing
to the English, [i] as is set forth in the rule. Others are bound not to
do this disadvantageous thing to the English, and the English are
bound not to do it unto others.

Look you! You may establish the same doctrine by the articles
of the peace contract and of the treaty of alliance made with Spain:
[k] "Likewise, that neither nation shall furnish or consent to the fur-
nishing by any of its vassals, subjects, or resident aliens, of aid, coun-
tenance, or counsel, direct or indirect, of supplies, of instruments or
munitions of war, or of anything else whatsoever that could support
in war enemies private and public of the second party and rebels
against its authority, of whatsoever sort they are, whether invading
the realms, home-lands, or domains of the second party, or with-
drawing from obedience to it and from its control. Nor may the
subjects or aliens, of whatsoever nation or quality they are, whether
on the pretense of intercourse and commerce or any other suitable
pretext whatsoever, aid in any way the enemies of the aforesaid
princes or of any one of them, or furnish supplies, arms, engines of
war, mortar-pieces, instruments for carrying on war, or other war-
like equipment. Let those who shall have violated these provisions
understand that the most severe punishment will be inflicted upon
them, such punishments as are inflicted upon those who break treaties
and are seditious." The provisions of this contract seem especially
clear against the English in this case, for it is held as certain that
the Turks are enemies of the Spaniards and, therefore, of the Sar-
dinians and Maltese. The Turks are at war with the Emperor,
who is the relative of the Spaniard, and who is explicitly named
among the supporters of Spain in the words of the thirty-fourth peace- 84
article. Consequently, it is also clear that he is included in the said
treaty of peace with the Spaniard. [l] Furthermore, I would seem to
have written elsewhere that all Christians are at war with the Turks.
Likewise I observe that the Spaniard is one of the allies of the
Emperor, and that the Emperor is battling with the Turk for those
lands over which the Spaniard has the right of succession, so that in
this way it interests him too, not to have them taken from his family.
Besides, the Turk would now also seem to be an enemy who may
invade the home-lands of the Spaniard.

Now, these considerations influenced me strongly to express an
opinion adverse to the English in this case, who from all sides were
carrying forbidden articles to the Turks, to the enemies of the Span-
iards. [m] As Comensis writes, merchants often sin in this respect.
But after examining what can be urged in defense of the English, since

the opposing arguments mentioned above do not present any difficulty, for they do not really present a difficulty, I reply that in my opinion the English have the right in their favor, and that the Sardinians and Maltese are wronging them.

Further, with reference to the other merchandise, which constitutes far the largest part of the property concerned, the merchandise outside of the contraband mentioned above, I think that the English are undoubtedly right. [n] When lawful and unlawful merchandise belong not to the same but to different persons, the lawful is not confiscated on account of the unlawful, nor is the lawful confiscated even if both go with the same skipper. This is the view which Cynus, Baldus, and Salycetus prefer. "This is the truth," says Baldus. [o] "It is the truth," Bartolus says also, and Alexander makes the same remark in commenting on Bartolus, [p] and later Felynus and others express the same opinion. [q] This is undoubtedly the common opinion in the case where owners of lawful goods have not known about the unlawful goods. [r] Undoubtedly he did wrong in ignorance, as Ripa writes on this very point, and he remarks that in a doubtful case ignorance is presumed, etc. It is unreasonable to think that a lawful thing should be confiscated on account of an unlawful one, since when things are separate and distinct the principles applied are separate and distinct, as we find in Baldus. It is unreasonable that the hatred felt for one person should incommode another, as Salycetus has it. These lines of reasoning are general and approved everywhere. Therefore, the view would be established also by common usage, and on this point there is a passage in Clarus. He says that this view is the milder, and is therefore the one to be held, and in this case Clarus is even assuming that the owner of the lawful goods knew about the unlawful goods. Furthermore, what others say of the man in ignorance should not be taken of one who does not know, but of one who is not a partner. Otherwise, that truth, stated by Bartolus and by others, concerning lawful property which is not to be confiscated with unlawful property will have too wide a scope, if it applies where both were in charge of the same skipper. Now, Baldus, to be sure, interprets this word by writing, "What belongs to another is not to be confiscated, unless that other was an accomplice in the offense." Indeed this is the common opinion, "that all property is confiscated, whether it belongs to the skipper himself or to another, provided he knew and *consented,*" as Clarus reports. It is not enough to have known, unless one shall have also consented, [s] unless one shall have been "acquiescent," as it stands elsewhere. [t] Indeed, the man who is associated with another in an offense is in consequence thereof an accomplice even. Those who commit a crime, and, to quote the common phrase, those who consent to

it, suffer the same penalty. The phrase does not refer to those who merely know. Now, there are certain cases in which the mere knowledge of an offense prejudices your case. Among these this case of ours is not mentioned in the books, as appears from Menochius, who recounts them. Consequently, [u] as our writers usually argue, this case would not fall among those. But could our opponents show in this case any knowledge of the unlawful goods on the part of the English who were owners of the lawful goods, and could they maintain that this is one of those cases where mere knowledge prejudices one's cause? Therefore, I conclude my argument concerning lawful goods with confidence, [x] for there is nothing in Imola's opinion. He thinks that the laws which mention the smuggling of dutiable goods 86
and enact that non-dutiable goods are not subject to fine or confiscation do not apply particularly to the case of lawful and unlawful goods carried together, and, therefore, the parallel fails, and lawful goods may be subject to confiscation, as the doctors maintain. This difficulty of Imola I would resolve by simply saying that all the other doctors hold and set forth the opposite view. However, other reasons also which I have given elsewhere, and which the doctors give, go to prove the accepted view.

Now I come to the second point which in general would go to protect even the said unlawful merchandise. The English were captured *en route*, before they reached the place whence, as Cynus says, they could not turn back. Therefore, the property is not subject to confiscation, because they could return and repent, as Cynus teaches in commenting on unlawful merchandise. They could refuse to sell at Constantinople, or tell me, who would have forced them to sell? [y] Indeed in commenting on the aforementioned laws of my opponents, the learned Suarezius in a case like this one of ours makes this plea in defense of a Genoese ship which likewise went to the lands of the Saracens with arms and other contraband goods, and was captured on the way. "If anyone shall have sold," says the law. Notice that it requires a completed act. The other laws too call for the completion of the act, as we see in Suarezius. [z] Thus in the case of the statute which forbids the exportation of grain or anything else, the law is the basis of the common opinion that the statute and the penalty imposed by the statute take effect when the article has been exported, not while it is being exported and is on the way. My position is not weakened if in connection with this statute a usage is urged contrary to the opinion of the expounders of the law, since a usage would have to be proved, for the establishment of which at the most we trust the testimony of learned men only for the places and times in which they lived. To be sure, the cautious Clarus him- 87
self speaks to this effect: "With *us* the practice is observed with-

out distinction of punishing men caught on the way." Now, this usage will have no bearing on our case, for usages have to do with a fact and so they do not undergo extension either in the way of place, or of person, or of situation. Therefore, the usage must be established for that very kind of case which comes under discussion. Every one of these points is already known.

I offer now a third argument, based on Suarezius, whom I have just mentioned, to the effect that the English ought to be exonerated for the very reason that this powder and the other material of this sort was being carried for the ship's use. So Suarezius in the case involving the Genoese, which he was arguing, says that the law would not hold those who were carrying for a ship's use articles which otherwise they would have been forbidden to carry. [aa] Although the exportation of grain may be forbidden, still the prohibition is not applied to that which a man carries for his own use. This likewise is the common opinion under the law, whatever Clarus whom I have mentioned may add to the effect that the opposite practice is followed among his countrymen. To this observance we have just now replied, so far as our case is concerned.

But suppose there should seem to have been a somewhat larger quantity of powder and of similar things than could apparently be intended for the ship's use. Why, I say that the battles in which a ship may be engaged do not admit of so careful a calculation as you suppose. For the use which they had to fear they provided generously and wisely, so that they might have an excess rather than a deficiency. Now, let no one raise the objection that the law does not allow a *soupçon* of anything to be carried to the barbarians, not even a whetstone, for that did not happen in this case of ours in which supplies were taken for the use of the ship. Further, that matter of the *soupçon* does not apply in the case of these articles about which our questions turns. [bb] In that connection the purpose is to prevent the heathen from being led by the grain and fruits which they may have tasted to turn their arms against us. Now, the purpose
88 in this case is to prevent the heathen from being helped against us in carrying on war. But no help can come from such a scanty supply, for, [cc] when the law mentioned a "whetstone," without doubt in accordance with a common legal practice it wished to cover a number of things of the same sort by the particular term. Remember, too, that the Turks today are not the same people they were three hundred years ago, when those canon laws were published, a people unacquainted with all these articles and lacking them. At that time that matter of the *soupçon* would be applicable, even in the case of those articles which, carried to them in ever so tiny a quantity, could have taught them of how much value property was and how it was

acquired. This is not the case with the Turks now, as everybody surely knows, [dd] although Straccha may not have considered this in setting down the opposite view, but his conclusion is in the very terms of the law.

I add the fact, too, that if any of the articles which were being carried for the use of the ship were left over, the English could lawfully sell them. [ee] So, to speak of the things which can be provided merely for one's own use, it has been held that they may be sold, if there is no use for them afterward.

By a fourth consideration I am led to the same line of defense, [ff] that the mere carriage of contraband is not such *per se,* but [it is unlawful], because it would seem to assist in doing a wrong, that is, in giving aid to the Turks. This assistance, since in this case it would be many stages removed, would not imply irregularity, to say nothing of any other criminal offense. Thus, for instance, the man who furnishes a remote incentive to homicide would not be guilty of an irregularity. This is literally the reply made by a man of clear judgment and of eminent erudition and uprightness. To the same effect Navarrus, who praises the man I have mentioned, lays down the ruling that he who builds triremes for the Turks gives them a very remote incentive to fight the Christians. But to serve on Turkish triremes when they were warring against the Christians would be to assist directly in doing wrong, and it has been so characterized by the canon law. Carrying arms to the Turks would not 89
be a direct wrong nor a wrong at all in this sense, to adopt the distinctions which these very writers make in following others. Have not the Turks today various wars amongst themselves, waged both at the gates of the city and against the Persians? Now, to carry such articles to the Turks as will be very probably used against the Turks is not forbidden, [gg] for no one questions the lawfulness of helping infidels against infidels, as Navarrus and another very learned Spanish scholar, Molina, remark. Christians may fight with the Turks against those who are not Christians, Navarrus says, and he remarks that we are within the law in helping them against other Turks. Consequently the possibility that the Turk might use these munitions against the Christians is very remote indeed, for he is rather far away from the Christians of that region where this ship was or was going to be, and very far away from the Spaniards. Besides, in this case we can defend the opinion of those who have always said that a penalty is not incurred if these things are carried with no intent of furthering an attack on Christians. The words of the canon law indicate this, and Navarrus adds what has just been said about assistance, although writers commonly offer another interpretation of this law. We ought not to depart more and still

more from the words [of a law], but we ought to return more and still more to them.

In our case the view mentioned above, which is in harmony with the letter of the law, can be the better defended, since, in comparison with the other merchandise, that which is called unlawful amounts to almost nothing. There would be very little of it, what you might call a makeweight, [hh] and a makeweight is not considerable, so as to vitiate or alter completely the character of the main cargo. The greater and the beneficial, claims the judge's attention, not the less and the prejudicial. In this case I say that the powder was a makeweight; I say that the iron was, and I make this assertion for the very reason that it was put on board in the customary manner as ballast to
90 steady the ship. In our case that view can be the more defended because the English actually wished to sell to the Spaniards, and everything was intended for another place, and for a place besides, where they had a right to take it.

Clearly, therefore, the innocent purpose of the merchants is evident, still, in view of their purpose, so far as it is inferred from the carriage of contraband, the carriers are liable to punishment. In the case of these articles which are absolute contraband, the evil intent which I have mentioned is taken for granted, they say. [ii]Still, as Navarrus remarks, this is not the presumption of the law and in accordance with the law. Suppose farmers, who would not think these articles contraband, were carrying them. Navarrus thinks that they are excusable. Why do we not form the same favorable judgment in the case of these merchants who would without doubt have thought that they were not forbidden to use these articles, which were a makeweight in getting ballast, which were taken in very small quantities, and would very probably be used against other Turks. It was even lawful to take them to the Turks under the orders in council of Queen Elizabeth. The English know and follow these laws of their native land. They do not know other laws; they do not know the canon laws mentioned above, which have actually disappeared in England. Shall I say, in England, or everywhere? [kk] At all events, our doctors write without reserve that those admirable articles of the civil law, which we have cited above, are not followed. So, then, we have had the fourth argument, that, when the evil intent mentioned above is not shown, the penalties involved do not apply to these merchants.

The fifth argument is likewise drawn from Suarezius who, as I have mentioned, wrote on a case parallel to ours. He says that people who carry such cargoes are always exonerated, provided they have made a manifest with an official, [ll] and his authority is Bartolus. But the Englishmen in our case have made a manifest of these ar-

ticles with an official and under the orders in council of Elizabeth they may carry them anywhere, except to the enemies of the Kingdom of England.

This reasoning is irrefutable, for although Navarrus said that a prince could not free his subjects from the application of that law of the Pontiff or of the Council, this conclusion would be true in the 91
case of those princes who acknowlege that they are not true sovereigns. We say in the case of a sovereign prince what Navarrus said of the Pontiff, that a sovereign prince can free his subjects from that law, which would only be binding because all are bound to obey the precept of the Pontiff, as Navarrus, in following other authors, puts it. [mm] This is the principle which the glossator, Innocent, Hostiensis, Ancharanus, and Felynus hand down in this case concerning the power of the Pontiff and the Church. But in this case the King of England, the King now of Great Britain, will not brook being made subject either by the Maltese or by other peoples to the laws of anyone else, and it concerns the public peace that no doctrine of this sort be listened to. [nn] It was a very wise thing that, in the articles of peace, even the King of Spain does not mention among his friends the Roman Pontiff whose name is not usually omitted elsewhere. Tell me, would the French brook being made subject to those laws? Would the Venetians? No, is the answer given by the men mentioned above, who write that the aforementioned laws are not followed. [oo] Others observe that these laws are not followed, even by the people of Pisa or of Genoa. This offense is ecclesiastical, as Ancharanus and Zabarella remark. The King of England, the King of Great Britain, the head and arbiter of ecclesiastical affairs in his own domain will see to it. [pp] Indeed, even under canon law the Pontiff has only wished to show Princes what punishment ought to be imposed for this offense, recognizing the fact that on the Princes fell the duty of imposing it. This is the reply which we make concerning the laws of the Emperors, which are binding on the subjects of the Emperors, not on other people, and not on the subjects of the King of Great Britain.

These statements unquestionably apply to all laws, whether canonical or civil. The laws do not even mention this situation when a very small quantity of contraband is carried, as in the case before us, along with a great deal of lawful merchandise. With reference to the guiding principle of those laws which contain the law of nations 92
and hold all men to strict conformity, and with reference to our discussion in the books " On the Law of War," we make this reply: From these sources they can prove only that the Maltese and others may obstruct this trade, not that they may punish either in person or in property those who seem willing to act in violation of this

law of nations, for the law of nations punishes offenses only when they have been brought to completion. [qq] Now, when an offense, not brought to completion, is viewed in the light of a completed fact, the action does not follow nature, which is opposed to it, but it follows a legal fiction which involves, so to speak, a certain inaccuracy. [rr] Consequently, the law of nature does not allow the punishment of death to be imposed for inflicting a wound from which death does not follow, and if it is imposed, it would be an affront, as it were, to the law of nations, as Alexander puts it. Even in the case of the Hanseatic peoples, which I mentioned above, they had received a warning in advance with the reasons stated, and they were only asked to give up their trade for a time. In this case, the English would give it up forever in consequence of the war between the Spaniards and the Turks which is evidently going on forever. Even those steps were taken only with reference to articles useful in war; here in our question all the goods are involved.

Now, concerning the document which contains the treaty of peace with the Spaniard, we reply that the Turks are not to be understood there under the head of enemies, although reference was made to enemies " of any kind whatsoever," for what the kinds of enemies mentioned there are, is explained in the very same document: " As well those who invade the realms of the other, as those who withdraw from the sovereignty of the other." The treaty does not speak of the situation which would arise when the other prince should invade the realms of a third sovereign or wage an offensive war. It was wise not to link defense, which as a rule is justifiable and beneficent, with offense, which is frequently unjust and more
93 frequently still maleficent. It was wise also not to leave it in the power of the other by waging war to disturb commerce, which is a most beneficent thing. Now, the Turks are not at present waging war against the Spaniards. The treaty does not apply to the Turks, I say, although the Spaniards may seem to be perpetual enemies of the Turks. [ss] They are not, properly speaking, " these enemies " with whom there is no war and against whom war has not been decreed, although there may be some enemy rights in relations with them. [tt] Not that which has aptness for being of a certain character, is properly said to be of such a character, but that which is actually of that character. Now, the Spaniards are not actually enemies of the Turks at the present time. [uu] This word, which has been applied in the light of actuality to one, ought not be taken in the light of aptitude in the case of the other, and should be thought of as applied improperly. But the word " enemies " put here in the treaty clearly marks enemies in the light of actuality, " invading " the realms of the second party to the treaty, " withdrawing " from the sovereignty of either one.

Furthermore, we must not say that our sovereign, the King of Great Britain, with an endless state of hostility on the part of the Spaniards going on, would have wished the trade of his subjects, important as it is, to be disturbed forever. Bitter would be such servitude; harsh, the interpretation, and not to be accepted. The interpretation would not be the same for both parties, for our sovereign, the King of Great Britain, has no perpetual enemies; he and the Turks follow principles of law in matters of trade. [xx] But the interpretation should be followed, by way of restriction and extension, which keeps the burdens equal, takes equally into account the interest of both contracting parties, and is the less prejudicial to one of them. Now, cases of this sort are numerous and common in the writings of our doctors, and admit of no question.

But if you say that at the present time the Spaniards are actually
at war with the Turks, since the Turks are waging war with the 94
Emperor, the relative and supporter of the King of Spain, and on the borders of the Spanish home-lands, the reply to the point is easy: The Emperor was the first to begin this war against the Turks which has been going on for the last thirty years without any interruption; furthermore, the principles of law governing the Emperor do not apply to the King; [yy] finally, kinship, which is a matter of private interest, surely does not concern public affairs. Besides, the naming of the Emperor among the supporters of the Spaniard counts for nothing in this case. Surely this fact is not to be taken seriously, but it is a kind of formula to satisfy time-honored procedure and to give expression to good-will. Now, how can practically all the same people be named as supporters on both sides without making this a mere formula of procedure? [zz] People who have not given support in time of war cannot properly be named among one's supporters. The Emperor did not support the Spaniard in the war which was carried on between the English and the Spaniards; for instance, the Emperor and Elizabeth always observed the rights of friendship during the war; and the same Emperor has even been named among his supporters by our King. Besides, think of those who are called supporters, who have neither named themselves nor ratified their nomination by the high contracting parties. They are not bound by the articles of the treaty; therefore, others are not bound either. This is the reply which Angelus makes on the subject of ratification, and the principle is undoubtedly sound.

Of less than no account is the statement that war is going on over the home-lands of the Spaniard, for the lands over which the Emperor and the Turk are at war cannot be called Spanish except by remote anticipation. [aaa] What is neither possessed nor controlled by the Spaniard is not called Spanish. [bbb] We scarcely call the father's

property the son's, and when we do, the expression is incorrect. There are other parallels. Finally, the point which I mentioned, with reference to the auxiliaries which the Spaniard has in the armies
95 of the Emperor, disappears on remembering that [ccc] he who gives aid in a war is in a state of war, it is true, but is not carrying on war on his own account.

Therefore, we have replied to all the arguments on the other side, and the law governing merchants has been established, [ddd] in whose favor, even in a case of doubt judgment should be rendered.

a—l. 1. 2. C. quae res exp. non deb.
b—l. 2. 4. ult. C. de commer.; l. cotem. D. de publican.; Gail. 1. de pa. pu. 1.
c—Alc. C. de pa. sa. la.
d—Nov. 117. et proem. Inst.; Alb. Virg. 2.; Scip. 1. parerg.
e—c. 6. 11. 12. 17. de Iudae.; c. 1. extrav. comm. eo.
f—Panvin. de imp. Rom.
g—Alb. 1. de ju. bel. 21.
h—A. ab Ex. rub. de const. num. 55.; Decia. 1. cons. 25.; Alb. 2. de ju. be. 17.
i—Navar. cons. 4. tit. 17. lib. 3.
k—Art. pac. 4. 20.
l—Alb. 1. de ju. bel. 12.
m—Com. l. cotem. de publican.
n—Cy. Bal. Saly. l. 3. C. de naut. fen.
o—Bar. l. 11. de publican. et add. ibi Alex.
p—Fely. c. 11. de Iudae.
q—Decia. 5. pr. 10.; Clar. §. fi. q. 82. sta. 7. nu. 9.
r—Rip. de pe. rem. n. 132.
s—C. Greg. de malef.
t—Alc. l. 31. depo.; Menoch. de arb. 355.
u—Crav. cons. 6. n. 97.; Ruin. 1. cons. 95.
x—Imo. l. cotem. de publican.
y—Suarez. alleg. 8. Habes post opera Stracchae, edita Coloniae 1595.
z—Fulg. l. 4. de usufr.; Bal. 3. nu. 5. C. de na. fe.; Clar. §. fi. q. 82. sta. 7. nu. 8.
aa—Imo. l. 45. de leg. 1.; Clar. d. sta. 7. n. 4.
bb—Alc. 2. de V. S. et 4. disp. 11.; Menoch. de arb. 585.; Tiraq. de jud. in re. exig. lim. 32.
cc—l. 158. in usu. de V. S.
dd—Strac. 4. de mercat. n. 26.
ee—Clar. d. sta. 7. n. 5.; Dec. 1. 2. si cert. pet.; Stra. 4. de mercat. num. 86.
ff—Navar. cons. 31. de sent. excom.
gg—Molin. de ju. to. 1. tr. 2. disp. 112.; Navar. cons. 2. tit. 3. lib. 4. et c. 6. de Iudae.; Mantu. 2. cons. 241. et ibi subscr. Decian.
hh—Ceph. cons. 611.; Menoch. 648.
ii—Navar. d. c. 6. not. 10. num. 27.
kk—Fulg. d. l. 2. C. de comme.
ll—Bar. l. 1. c. de lit. et it. cust.
mm—DD. d. c. 6. de Iudae.
nn—Art. 34.
oo—Stra. c. 4. de mercat. n. 8.
pp—Alex. de Ne. ad Panor. d. c. 6.
qq—Bal 1. cons. 294.
rr—Alex. 3. cons. 77.
ss—l. 5. 24. de capt.
tt—Ias. l. 2. C. de inoff. testam.
uu—l. 4. de vulg.; Rui. 1. cons. 96.
xx—Crav. cons. 70. 133.; Menoch. 117. 128. 144. 196.; Deci. 106. lib. 3.; Non. ult.
yy—Alb. 3. de ju. bel. 23.
zz—Aug. cons. 390.
aaa—DD. rub. de no. op. nu.
bbb—DD. l. in suis. de lib. et post.
ccc—Alb. 2. de ju. be. 2.
ddd—Alex. 7. cons. 30.; Mantu. 2. cons. 40.

CHAPTER XXI

On Holding to the Civil Law in Appeals from a Judge of the Admiralty

The question is whether those who profess the English common law ought to be among the appellate judges when an appeal is taken from a judge of the Admiralty, or whether those alone should be appointed who profess the English civil law. For so I distinguish the two kinds of law. I do not call the one English law and the other Roman, for in a sovereign state there is no law but that of the state itself, [a] and those who say otherwise speak incorrectly. Now I thought the opposing view was helped by the consideration that it may be regarded as indisputable that note should be taken of the common law also in this court of the Admiralty, and that, in consequence, those versed in that law should sit as judges in the court mentioned. Then, too, we appear to have a weighty consideration in the fact that in the Admiralty Court the judge is ordered to give his decisions, so runs the royal letter, according to " our " law, under which designation is understood not the English civil, but rather the English common law. [b] To this effect write the commentators on the civil law themselves, expressly with reference to the letter of the English King. Then what of the fact that the custom is believed to obtain of having the judges for hearing appeals here taken from those versed in either law at the discretion of the person who has to appoint those judges, [c] and these same writers of ours hold that in a question of interpreting a usage, and the royal letter may be re- 96
garded as interpreting one, a single occurrence of the act in the given way is sufficient. But a usage both establishing and destroying precedent would be presented, if we should have the repeated appointment of some professors of this common law as judges. Such are the considerations that occurred to me in favor of this promiscuous selection of judges. But since these and similar points present no real objection to my position, I think that in this case those only should be appointed as judges who, like the judge of the Admiralty himself, are professors of English civil law.

My reason for holding this opinion is that appellate judges have to consider whether the first judge decided rightly, a question which must be decided on the basis of the law according to which he had to render an opinion, and this law is precisely that which he professes,

namely, the English civil law. Now, in this review of the cases appealed, I do not see, and no one else, I fancy, can see, what the professors of the other kind of law could review. What if that other kind of law should contain enactments contrary to those of the civil law? [d] The view of a distinguished man that a ruling given in harmony with the school of the interpreter should not be criticized, always holds good. Therefore, if the ruling of the judge of the Admiralty is given in accordance with the law he professes, that is enough. Now this is my first argument. The judges who hear the appeal should be of the same class as the first judge. But the first judge is a professor of English civil law. Therefore, the judges who hear the appeal should be professors of the English civil law. [e] The judge who hears the appeal should preserve what the original judge preserved. An appeal-case is of the same nature as the original case. [f] And as God's representative (I quote the very words of Oldradus) let the judge in the appeal review the case. Should not the judge simply pronounce the earlier decision as unjust or just? Accordingly, the case is just the same in the second instance as it was in the first.
97 Why should I quote that platitude to the effect that the substitute should be of the same character as the man whose place he takes? For the appellate judge is a sort of substitute. [g] The setting in which a judgment has begun should determine that in which it should end, and this is the more creditable course to follow, and a course in harmony with the law; therefore [it should end] under the law under which it has begun. But if the contrary usage is urged against all these considerations, a reply will presently be given to this objection.

Meanwhile the second argument will be that every passage which could lead to different decisions on the same case should always be blocked. [h] From this comes our popular maxim that the continuity of cases should not be broken; and that one part of a case should not be heard before one judge, and another part before another. Then, too, the consideration is urged that different decisions should not be given in one and the same case. [i] And so all laws always take care that the judges be even constrained to render the same decision. [k] Thus an odd number of judges is chosen that one decision may always prevail. In the same way there are numerous other points of the same kind. But pray, who can doubt that those versed in the common law and those versed in the civil law will disagree? [l] "Mankind's proneness to disagreement is natural." [m] Those jurists have long entertained feelings of open and inveterate hostility for one another. Even the laws of which we are speaking disagree; yes, they do. Either the laws disagree or else the expounders of the laws disagreed in that case which the illustrious Emperor recently decided in harmony with our contention, for according to the pettifoggers

of the common law an enemy obtains a legal title to a thing when he has captured it and kept it for a night, while according to civil jurists he has first to bring it clear through to a point within his fortified lines. Or, if these laws are in harmony, then what is decided by the specialists in the civil law will be understood as likewise decided by 98
the specialists in the common law. Why then, pray, should the latter be convoked and wearied to no purpose, or rather, with the danger that a right decision be destroyed through discord, or a wrong decision be not corrected through discord also. [n] To no purpose is that done by many which can be done by few. Badly is a thing done by difficult means, when it can be done by easy means. Therefore the method which opens the way for these inconvenient wrangles should not be adopted. But to join together the professors of these two kinds of law, which is the method now proposed, opens the way for these inconvenient wrangles. Therefore this method should not be adopted. We could not have expected as bitter quarrels from those schools of the ancients filled with the followers of Proculus and Sabinus respectively, [o] by whom Justinian declares that almost all law was thrown into confusion, as we may expect from these schools of civil and common law in England. Of course the ancients had one source and one basic principle, but we and these pettifoggers on the other side have different and even conflicting basic principles. Woe to the party that shall litigate here before varying judges and under laws that are not in harmony. What, pray, may the man who received a favorable decision in the first instance expect but a decision against him; and a man who got an unfavorable verdict in the first instance, what may he expect but a favorable one? And here will merely this system in practice be urged against me to show that this inconvenience does not follow, as my line of argument would lead us to expect? Now, I shall hear of and learn that usage, if I can, but meanwhile a sound argument proves it to be, as we have said, of decided inconvenience.

The third argument will be that the English common law is not suitable to be used in meting out justice to foreigners. The English civil law would be more suitable. What has the common law of England to do "with them that are without?" [1] It lacks the intent, it lacks 99
the power, it lacks the language to deal with them. Come, show the statute of this law which would give the formula for a transaction, in Spain, say, between a Frenchman and an Italian, so that if judicial proceedings with reference to the transaction were to be instituted here in England, judgment might even be given in accordance with the actual law of England. [p] The court ordinances of the law of England shall be preserved in England, but the determining principles shall be sought elsewhere, for the discriminating method, which would

[1] [Cf. I *ad Cor.* 5, 12: "Quid ad me de iis, qui foris sunt, judicare?"]

have a transaction judged in accordance with the law of the place where it occurred, is altogether natural. [q] " I am the master of the world; the law, of the sea," Antoninus used to reply and, following Augustus' example, he would refer those who consulted him to the Rhodian law, by which maritime questions were settled. Now, as everyone submits to the civil law, especially in these maritime questions, as to a sort of law of nations, everyone will be judged according to that law to his entire satisfaction. Then hear the words of a Frenchman, [r] " that the greater part of the law of nations is Roman law and is alone generally accepted in the Occident." [s] Also a Spaniard says: " All those principles of the law of nations formerly belonged exclusively to the civil law, but they gradually spread, or quickly flew across to other nations, etc." This we see to be the case with Roman civil law, [t] and others too take this view. Or who does not do so? Who does not see that this is the case? And if the common law of England is not suited to cases involving foreigners, certainly judges who are professors of English common law are not suited to these cases either; those suited along with their law are the professors of English civil law. Now these are the arguments which I advanced in favor of not selecting the judges in this promiscuous way.

To the opposing arguments, advanced above, I now make reply. As to the first one, I claim that if regard should be had to the statutes of the realm, then professors of the common law also should not be admitted in appeals from a judge of the Admiralty. For-
100 sooth, just as the first judge too should give heed to those statutes, and just as he is still a professor of civil law, so likewise the appellate judges may properly be solely professors of civil law.

Now, this answer satisfies the second argument also. For whatever that phrase, " our law," in the royal letter may mean, seeing that the judge appointed to administer it is a professor of civil law, certainly we should retain similar judges to administer it in the case under dispute. Or we may go further. Because a professor of civil law is appointed to administer this " our law " we have sufficient indication that civil law is meant by that term; otherwise, an unsuitable judge—which God forbid!—would be appointed to administer it. The divergent view which our commentators express is to be explained by the fact that they are not speaking exclusively of the judge, [u] since they must indeed know that words, no matter how improperly used, are to be understood in harmony with the character of the person to whom they apply—[x] the rescript to the governor of Milan is understood, etc.—or else by the fact that our commentators did not notice that in England not common law but civil law itself is indicated by the term " civil law," just as we say: [y] for they surely

are aware that words are to be understood according to the usage of the place.

The third argument is harmless, [z] because it would have to be proved that each of the two foreign parties to the suit shared that usage [*sc.* of having judges versed some in civil and some in common law] with each other and with Spain. That transactions or judgments as between certain individuals do not prejudice other individuals is fairly shouted by the laws and sanctioned by the dictates of reason. Then, too, usage itself is strictly limited in nature. It does not extend to other persons, to other cases, etc. For if anything is done, [aa] it would not be done except so far as it is done; the usage would not be such, except so far as it is in use. Granted that these pettifoggers of the common law have pushed their way into marriage cases, into testamentary, ecclesiastical and maritime cases, and into others of this sort, which still have always been held
to be the peculiar province of those versed in the civil law, but granted 101
that they have pushed their way in, simply because those cases had to do with Englishmen, with English concerns, with transactions carried on in England; on this account, pray, shall they rush in and seize these cases involving foreigners? Even though this state of affairs is in part to be explained by the daily increasing power of those who study the common law, [bb] still the old landmarks should be preserved.

a—Caccial. l. cunctos populos.
b—Alc. 1. de V. S.; Dec. l. 2. n. 10. C. qua. non pe. par.; Rui. 2. cons. 4.; Cr. 988. n. 25.; Menoch. de arb. cas. 502. et cons. 434.
c—Dec. 3. cons. 124.
d—Gal. 4. de puls.
e—Ceph. cons. 708. num. 27.
f—Oldr. cons. 320. num. 6.
g—Panor. 2. cons. 5.
h—l. 10. C. de judic.; Menoch. de arb. cas. 371.; Crav. con. 997. n. 13.
i—l. 30. de lib. ca.; l. 17. de rec. arb.; l. 6. exc. rei. jud.
k—l. 38. l. 39. de re jud. et d. l. 17.
l—d. l. 17.; gl. proc. decretal.; Rui. 2. cons. 127.
m—Cowel. ded. ep. Inst. ju. Ang.
n—Alc. rub. de off. ei. cui mand. jurisd.
o—Hot. antrib. 11.
p—l. 65. ubi Bar.; Alb. alii. de jud.; Rui. 4. cons. 69.; Paris. 1. cons. 120.
q—l. pe. de l. Rhod.
r—Fab. 3. sem. 14.
s—Vasq. ill. 54. n. 4.
t—Donell. praef. ad comm. ju.
u—l. 12. de us. et hab.; Menoch. 4. praes. 78.; Crav. cons. 465.; Castr. l. 38. de V. O.; l. 6. de inju. ir. fa. te. ubi et Rom.; idem in l. 11. de mil. test.; Ias. auth. unde. n. 12. de inoff. test.
x—Crav. d. 988. num. 26.
y—Panor. c. 59. de se. exc.; Menoch. 4. prae. 141.; Peregr. cons. 41. num. 18.
z—Old. cons. 268. n. 7.
aa—Rui. 1. cons. 19.; Fulg. l. 5. n. 12. C. de legib.
bb—Prov. 22.

CHAPTER XXII

On the Absence of Right to Take away or Transfer Possession from Those Who Are Said to Have Bought Property Stolen by Pirates and Even to Have Bought It from the Pirates

The law says: [a] "The woman sentenced for a misdeed to work in salt pits, seized and taken from there by brigands of a foreign nation, sold by right of trade, and bought back, resumes her former status. Furthermore, the price is to be paid out of the fiscus to Cocceius Firmus, the centurion." From the abstract of this law very many of the doctors, indeed all whom I have seen, teach that those who buy a stolen article or an article forcibly taken by brigands recover the price from the owners. [b] Caepolla says so in the light of this law, as does he who has supplemented Caepolla. [c] This is what Jason holds, who refers to Caepolla. So Picus teaches, as Menochius adds to Jason, in the case of a fugitive who could have exported the goods to a place from which the owner could not have recovered them, "or not so easily." Ancharanus, [d] who teaches the same doctrine in the case of one who buys from freebooters, holds this view, even in the matter of recovering interest and damages. [e] Others speak of the "remote" hope of recovering such property. [f] Alciatus follows this course in saying that the view mentioned would even be quite "just," since, as a general thing, the owner could not have obtained
102 the goods mentioned from the brigands by any action at law. [g] Menochius holds this opinion too. And he cites these writers and several others, including theologians. Besides, he cites nobody on the other side, so that we may conjecture that there is no one on the other side. [h] I mention in addition Pomatius, Bonifacius, and the others quoted by him, as well as Mantua and Straccha, who speaks particularly of pirates. [i] Even when one ransoms freemen from a robber or a pirate he may keep the ransomed persons as security until the amount of the ransom is paid. Therefore, it is clear that on this count possession should not be transferred from those who have bought stolen property, even from the robbers.

Against this point the confused discussion of Covarruvias should not be brought, for Menochius actually cites him in support of the position taken above. Likewise Covarruvias deals in a confused way with the *actio negotiorum gestorum*. It does not follow that if an *actio negotiorum gestorum* be refused to those who paid the ransom,

an *exceptio* and *retentio* should likewise be denied them, for these two processes are more readily granted.

The fact should not be urged against our argument that the law speaks of pirates of a foreign nation; that this case concerns Englishmen who have redeemed from English pirates property taken from the Venetians; that therefore the English have not obtained the property from a foreign source,[1] [k] and that even Englishmen would not be foreign, so far as Venetians are concerned.

Now, I will reply that the jurist has happened to use this word "foreign," which he employs, because of a particular situation, as comes out clearly from the written account of the case and from the fact that a man's proper name is used there. [l] Consequently, this interpretation ought not to be restricted to the particular case. Besides, the theory of the doctors is to the general effect that property in the situation mentioned is not recoverable, and it leads to a general conclusion, even with regard to the non-foreign, and their theory makes it clear that they have made their statements in a general way, and not with a restricted application to the case mentioned in the law. Furthermore, the reasoning which safeguards the interests of the owner, appended by the glossator to the law, is without doubt of general application, and also concerns our case, because 103
otherwise recovery would not be easy. This reasoning is a deciding factor in the present case before us, as the judge [m] with whom the decision rests in this matter clearly sees. Then comes the point which Ancharanus raises and interprets in the case of non-foreign freebooters, as we have already stated. But come, let us examine this very matter of a foreign nation. Undoubtedly the law says: [n] "I have no doubt that independent allies are foreign to us." But Budaeus, against the authority of the texts, as he confesses, reads, "would not be foreigners," to make the sense consistent, because the right of postliminium does not exist with allies, but does with foreigners. [o] Furthermore, the famous old grammarians teach that a foreigner is one whom we speak of as belonging to a foreign nation, to an alien land, as coming from another people, [p] and in Virgil we read: "If you seek a son-in-law from a people foreign to the Latins . . . I think that every land which is free and not beneath our sceptre is foreign." [q] In Cicero, too, in the case of the allies who were in a Roman province we find the expression "foreign tribes." [r] Those who are not subjects are foreigners, as one reads elsewhere in the law. [s] There are, in general, two kinds of peoples, says Bartolus:

[1] [For the sake of bringing out the distinctions which Gentili makes in the following argument somewhat arbitrary meanings have been given to the words *exterus, externus,* and *extraneus.* The first two words have been rendered by "foreign" or "foreigners" and the third by "strange" or "strangers," as being—although not entirely satisfactory—at least more intelligible to the average reader than the almost obsolete legal terms "externs" and "extranes."]

the Roman people and strange peoples, and with reference to them, he also cites the law mentioned above, and among them he refers even to those with whom we are at peace and even to those with whom we have a treaty. [t] And under the law there are other foreigners who are subjects—to use the Virgilian expression—" whosoever are obedient to our sceptre." [u] Under the law, the people are foreigners who belong to another province, even if they are not under a different ruler. Thus, the ancient translator of the *Novella* renders *ἀλλοδαπήν* by *terra extranea* (strange land). *Ἀλλοδαπός* means a man sprung from another soil; he is of foreign extraction with respect to the native. Consequently, to put it briefly, the meaning of this word would be double, and under both meanings the Venetian may be thought of as a foreigner to the Englishman. He would be, I say, a
104 foreigner as well as a stranger. Indeed, he seems more of a foreigner [1] than of a stranger, [x] for property can be left by will to a stranger, but not to a foreigner. A foreigner is a resident alien, not a citizen. The reasoning of Budaeus does not influence me, since it rests on a false foundation, arguing as he does that we understand under foreign nations those with whom we have the right of postliminium, not other peoples under a foreign rule. In point of fact, all these people are foreigners, [y] although postliminium does not exist with all of them. Postliminium exists with those foreigners with whom we are not on friendly relations, as I have set forth elsewhere. Consequently, the above mentioned law will have a consistent meaning, provided, at least, independent allies are foreigners in our eyes, and yet do not hold such a position that we may have postliminium with them. So the Venetians, as I have said, are foreigners in their relations to the English. Now, because Englishmen have bought up the property in this case from Englishmen, it will not injure them in the suit, if it would not injure a Venetian who in like circumstances had bought it from Englishmen, and it would be enough that the pirates are foreigners to the Venetian who was robbed, even if they were not foreigners to those who bought back the property. It is absurd to hold an Englishman more strictly than a Venetian in his dealings with a Venetian. The law thinks of the nation of the robbers as foreign, not from the point of view of him who pays the ransom, since it does not mention him till later, but from the point of view of the party from whom the woman had been stolen, that is, the fiscus. But in reality the English have bought the property back from a foreign source, from the Tunisian prefect.

[z] Again, their case is not prejudiced by the fact that, as another law remarks, one may say that it is unfair not to be willing to restore stolen property until the amount given for it has been paid over by the owners, for this law does not apply when a thing has been bought

[1] [*Ille = externus; iste = extraneus.*]

from robbers or pirates, as Caepolla, Menochius, and others teach. In this case, as Menochius says, there is no place for the suspicion that the buyer of the stolen property has been an accomplice, or has been careless in looking into the status of the seller. These two considerations underlie this law.

Furthermore, concerning a matter which is not even open to doubt, this is more than enough. In fact, the conclusion would undoubtedly follow that possession, which we are not in the habit of 105
transferring even in the case of robbers, should not be transferred in the case before us. [aa] The right to possess even property stolen and property held by force is recognized, even if ownership of it cannot be acquired, for in such a case possession is not forbidden, even if ownership is. [bb] On any other basis there would not even be any claim to the possession of recovered property, so far as concerns movable property which has been stolen or pilfered. [cc] The Venetian has lost possession in consequence of the force used by a robber, just as he might have lost it in consequence of an inundation. Possession is also lost through theft. Now, we observe that in the case of movable property, when fortune inflicts a loss on us, our rights under the law too are lost, so that no person may maintain that property is retained for him, if he says [dd] that it was not his intention to lose his claim under the law, but that it is not retained, even though this claim be made, if the contrary be established. [ee] This position I approve in the case before us, because the Venetians ought not to have had such an expectation.

a—l. 6. de capt.
b—Caep. cau. 10. et l. 1. n. 1. C. de usuc. pro empt.
c—Ias. l. 19. C. de procur.
d—Anch. reg. peccatum. n. 11.
e—Alc. l. 21. §. quod ex naufragia. de adquir. poss.
f—Alc. 3. praesu. 29. col. 1.
g—Menoch. 5. praesu. 29. n. 26.
h—Pomat. ad Bar. l. 2. C. de fur.; Bonif. de fur. §. contrectatio. n. 96.; Man. aequil. d. l. 2.; Str. navi. p. 2. n. 18.
i—Decia. 9. pr. 29. num. 28.
k—Supra. c. 12.
l—Fely. c. 1. n. 18. de const.; Ias. C. qua. non pet. part. n. 22. l. 19.; n. 9. C. de pact.
m—Port. §. ferae. Inst. de rer. div.
n—l. 7. de capt.
o—Fronto, Festus.
p—Virg. Aen. 7.
q—Cic. or. 1. in Verr.
r—l. 13. ubi Cuja. qui test. fa. po.
s—Bar. l. 24. de capt.
t—Nov. 69.
u—l. 3. de. off. praes. et d. Nov. 69.
x—l. 9. 11. C. de hered. inst.; Ulp. tit. 22.
y—Alb. 1. de ju. bel. 12.
z—l. 2. C. de fur.
aa—Jo. Hann. l. naturaliter. n. 245. de usuc.; Crot. l. 1. §. si vir. n. 8. de adquir. possess.
bb—Damhoud. enchir. furtum.
cc—l. 30. §. item quod a mari. de adq. poss.; l. 12. §. ult. de re. au. ju. po.; Com. l. rem. quae. de adq. poss. ubi alii et Rip. num. 7. 8.
dd—Bal. l. Celsus. num. 82.
ee—Vide cap. seq.

CHAPTER XXIII

Whether the Purchasers of Plunder May Keep It for Themselves

The English merchants would refuse on any condition to restore to the former owners the captured property they have bought. Observe that they bought it at Tunis, and in Tunis it is not the law that buying even from pirates themselves is forbidden. But now, if the law or custom of Tunis, whichever you call it, did give judgment in keeping with the desire of these merchants, who can doubt that here too the same judgment would have to be given? [a] In considering the details and merits of a case, according to the common and universal view, the place where the transaction occurred is always taken into consideration. But these merchants bought from
106 the highest Tunisian officer, who had, moreover, the administration of the main fiscus. Accordingly at Tunis they would have been safe, and accordingly they would be safe everywhere. [b] He is at once safe who buys from the fiscus of any prince whatsoever, according to the more commonly accepted view; [c] or, whatever the law may be, it is certain that this is the actual practice, and such actual practice is regarded as law. Nor do princes suffer their authority to be questioned. [d] I do not dare, says Baldus in this connection, to assume a lordly air and speak against the power of princes. I am not the man to desire, says he, "to re-spade" the world. Now, too, some Englishman may say to me: "If the merchants had bought these wares in the open market of England, would they have had to make restitution to the owners, whether they were Venetians or Englishmen or others?" [e] The law of England, as I hear it, says no. Why do I say the law of England? Elsewhere, too, I doubt not, the law is to this effect. [f] It is at Padua. What! do we say with certain men that the law is not valid?

Fools though we be, we know [g] that actual practice, even though not established in law, is regarded exactly like law. [h] The custom of a place makes lawful the contract which would otherwise be unlawful. [i] That sort of contract is legal which is frequently used in a district by good men and lawful merchants. Why then, pray, shall they restore these wares bought from the Turkish fiscus?

[My opponents] will say [k] that I said in another case with reference to the fiscus of the King of Barbary, that only where the fiscus of one's own prince is involved does that legal principle, the law

bene a Zenone,[1] hold good and that I am contradicting myself, if I argue otherwise. But there are differences between the present case and that. [l] Note that the law mentioned provided that legal proceedings should be taken against the fiscus instead of the possessor. Now, this principle does not hold in the case of the fiscus of Barbary, which is an enemy to the Spaniards, as I pointed out there, but it will hold in the case of the fiscus of Turkey, which has treaty relations with the Venetians. Accordingly, the Venetians might and should take action there, and, accordingly, they could not object that the matter was now being handled outside the jurisdiction of the fiscus that made 107
the sale in this case, since it is still being handled just as it would be there in the circumstances. There are other differences between the present case and that other. There not only was the purchase made of pirates, but the fiscus did not interpose except as a mere matter of form, etc., and here I am urging, not so much the privileges of the fiscus as I am the common legal principle of taking into account the place of the contract. Therefore, let that argument stand here as follows: Those who are safe in accordance with the law of the place where the transaction occurred, are safe in England also; but these merchants are safe in accordance with the law of the place where the transaction occurred; therefore, they are safe here in England also.

Now let the second argument be: [m] The Atinian law, as also the law which deals with the taint inhering in a thing stolen,[2] operates between citizens and citizens; but the present action is not between citizens and citizens; therefore, no statement shall now be made regarding the taint inhering in a thing stolen. That law was able to bind these men also at the time when both Africa and Britain, not Venice alone, belonged to the Roman state. But such is not the case now that the states are separate and distinct. To illustrate, [n] Fulgosius replied to the same effect that the law, directing that action in reference to crimes be taken in the place where the accused persons are found, had its sanction in the legal principle in accordance with which the whole world was subject to the Roman Empire. But today, as shown by the facts themselves and by that splendid interpreter of law that should in no way suffer alteration, I mean custom, on account of the separate jurisdictions or principalities, this is not so, not even in the relations of states which have mutual treaties. Not even in the relations of states, I repeat, which have mutual treaties, as Baldus and Alexander hold against Bartolus. Baldus says that Bartolus does not satisfy the wise on this point, and that custom is against him, etc. But still, however the case may stand with regard to states which have treaties, [o] where Jason and others hold with Bartolus as to the law; where states have no treaties, the law is certainly as I have said. That civil law is

[1] [*Code*, 7, 37, 3.]

[2] [*Dig.*, 41, 3, 4, §. 6.]

108 not to be cited rashly, and what applies to a state must not be extended beyond the state absurdly. [p] Then let it be noted that it is valid to argue from crimes to contracts, for they are put on the same plane by the law. Therefore, if for a crime committed in one principality account is not given in another, as Fulgosius explains, then neither for a contract made in one principality shall account be rendered in another. Now, this argument is not weakened by the fact [q] that the woman sentenced to work in the salt pits, seized and taken from there by brigands of a foreign nation and finally bought back by right of trade, is said to resume her former status; nor yet by the fact that the slave stolen by bandits, afterwards in the hands of the enemy, then recaptured on their defeat and sold, is likewise said to revert to his stolen condition so that the purchaser cannot acquire ownership by usucaption. It is with reference to a state and its citizens that these statements are made, but my merchants are not Venetian citizens, to whom, it is asserted, these things which have been bought back belong; these things were not bought back at Venice, in which case they would have reverted to their stolen condition. Let me emphasize the fact that it is not with a single state or its citizens that our question has to do, and in addition let the reply be emphasized that our present case does not deal with things which have postliminium and revert to their [original] condition, for, as even the freebooters, from whom our merchants made the purchase, would belong to a foreign nation, the Turkish, so much the more would the goods have belonged to the freebooters themselves, and here I do not mean the fiscus.

Then as a third argument I add that what has been enacted with reference to stolen property should not be extended to property seized by violence. [r] You must admit that theft and plundering differ in species, as all theologians and writers on our law agree. [s] There are also differences of law between them. What is said regarding thefts is not extended to property seized by pirates, even though they be the very worst kind of thieves; [t] for Baldus maintains that what is said against thieves should not hold in regard to plunderers on the
109 road, that is, to highwaymen, who are likewise most pernicious thieves. Of course, in Baldus' question the exception to the rule applied to thieves, an exception which he does not wish extended to plunderers, because that which is not excepted would remain under the rule. [u] Now, we have a very definite rule and one quite familiar in the law of nations, to the effect that it is through purchase and delivery that ownership is acquired, and that it ought not to be taken from us without an act on our part; and likewise that it is lawful to buy anything and from anyone. [x] "Everything" is understood to be "duly" allowed which is not found to be "expressly" forbidden. And "in

a doubtful case" one should say that permission would be more beneficent than prohibition, etc. Nowhere, moreover,—show the contrary, if you can—do we read the words "expressly forbidden" in connection with the buying from anyone things forcibly taken by pirates from a foreign party. This is our case. These merchants bought wares forcibly taken from a Venetian by a foreign pirate and from the foreign purchasers of those wares in a foreign place. Either show that this clear statement is false or stand by the rule. [y] The matter is definitely in favor of him who has the rule on his side.

Do you wish some reasoning also to show why the special enactment with reference to stolen property does not hold in the case of goods seized by violence? [z] The enactment is special on account of the frequency of thefts, says Corneus. [aa] I shall add from Alciatus that a pirate commits a less serious crime if he commits it on the high seas which are under no law. [bb] For this reason the Venetians are independent by the sheer force of law, because their state is founded in the sea. For this reason this same Alciatus approves the celebrated reply of the pirate to Alexander; [cc] in this way we answer the query why Menochius says that the principles of the law *incivilem, Code, De furtis,*[1] do not apply to wares seized by violence. Accordingly, the argument is as follows: Under the rule even wares seized by pirates belong to unrestricted commerce; but these wares are such; therefore, etc. Now, the major proposition has been established firmly. [dd] Then, too, it would be established by Hotomannus, who "On Famous Cases" writes that arrangements with pirates are re- 110
garded as permissible because no law prohibits them; and Alciatus himself so thought and writes that the pirate should be deprived of no right of which he is not expressly deprived by law. But the second proposition is one which our opponents urge and which we nevertheless will deny most earnestly. From this we shall make our fourth argument: A thing purchased which does not come from plunder, shall be retained by the purchaser, as is certain and indubitable; but what the Venetian is now seeking does not come from plunder; therefore, it shall be retained by the purchaser. The Venetian has to prove the minor premise false. It is he that has to prove the identity of the things. [ee] Identity has to be proven by him who bases his argument thereon. [ff] Further, it has to be reconstructed. Otherwise the Venetian will fail to save himself, as Corneus says on this proposition. [gg] Then, too, the identity has to be proved by two concurrent demonstrations in addition to the identity of names. [hh] Now the proof is difficult here, where it is a question of things, which on account of their great similarity to other things of the same species, are difficult to recognize. Further, the recognition of uniform things, such as fruits

[1] [*Code*, 6, 2, 2.]

or such things as are here in controversy, namely, Indian silk and similar things, is called impossible. Let the Venetian show that the Tunisian governor bought these disputed wares of pirates, and that pirates carried off these same things from the Venetians. [ii] If it is at all possible that these might be other wares, surely the identity would not be proved, since proofs should lead to a necessary conclusion. Then there is another difference here between this case and that which I posited where the goods were purchased in Barbary. There the purchase was made directly from the pirates of that which had certainly been taken from the Spaniards. There the identity was demonstrated and admitted. There—and this is the point—the privilege which the fiscus had of selling was urged in objection to us;
111 but here we the rather urge the laws of the place as an objection.

What if I mention as a fifth argument that these goods had been lost by the Venetians, so far as both ownership and possession are concerned? [kk] This, to be sure, is the view of Jason, that when a thing has been lost, we do not say with a strict regard for the law that either ownership or possession is retained; and that such is the case when on account of the power of robbers as well as of the enemy the thing in question cannot be kept and there would be no hope of recovering it. [ll] Besides, there is nothing here in the statement that ownership is retained in intent, that civil possession is thus retained; for while such an intent should not exist here where the thing is hopelessly lost, above all neither could it accomplish anything even if it were to exist. Property so held would be understood to be as good as lost. [mm] Those things are understood to be as good as lost which are being carried by men going to war with the expectation that these same things will become the property of the enemy when they conquer and capture the men. The hope of recovery is active here. Where the robbers do not belong to a foreign nation that hope can exist; it cannot exist where they do. The laws which have respect to the state could not apply to foreign peoples. Then, too, I here seize upon the assertion of the Venetians that the seller in question was a robber and that Tunis is a den of robbers, since they are likewise infidels, and therefore robbers of a foreign nation, in whatever way you may look at it. [nn] Further, while they are infidels they are likewise enemies and, therefore, what has been captured by them has thereby become their property, and further, so true is this that the citizen who buys the property back makes it his own; and further, that any one of the original owners who may chance to have bought it, holds it now by a different right. And there is no difficulty raised by the fact that the Turk has a treaty with Venice and is a friend, as the Venetians likewise assert; for it is certain that in spite of their friendly relations this treaty and this friendship do not embrace

pirates. They are left outside. They are left beyond the reach of any public complaint. Accordingly, they are left in the general law which deals with infidelity and hostility. Then, too, no difficulty 112
is presented by the fact that goods seized by pirates do not become their property; because this is true only of pirates who are not enemies, and not of pirates who are likewise enemies. These pirates are enemies, as I say, and the Turk along with them is an enemy of the Venetians, since he protects those pirates openly everywhere and always. But if the goods were certainly lost to the Venetians, what grounds for displeasure have they, if Englishmen bought them? [oo] Cannot each individual advantage himself while he is not injuring others? Or is the Kingdom of England not free? [pp] The Venetians, in answer to the complaint of the French King that gunpowder had been bought at Venice and carried to his enemies, asserted that their state was free and that no one was ever forbidden to trade there. I likewise declare that my Englishmen are free and have not been forbidden to trade anywhere. [qq] To secure what does not injure you and advantages the other man should be the judge's continual aim, and even the devil should get his due, as our countrymen say.

I shall add one thing more in conclusion. Our countrymen have their trade with Tunis, Algeria, and many another state taken from them by this claim of the Venetians that those states are nothing but piratical retreats and that there is none in them but pirates and that the very magistrates in them are pirates too. [rr] The Venetians were incensed without measure at the traffic of the Lusitanians in the Orient and at this traffic of our countrymen they are just as incensed.

a—Ceph. cons. 708. n. 26.; Dec. 1. cons. 11. n. 185.; Bar. Ias. l. 1. C. de su. tri.; Bal. rub. de const. n. 42.; Mantua aequil. l. si fundus. de evict.; Peregr. cons. 90. n. 23. et cons. 103. n. 5.; Crot. c. ut animarum. n. 30. de const. 6.; Bertr. cons. 9. vol. 3. p. 1.; Gabriel. de consu. concl. 1. et 2.

b—Ceph. cons. 634.; Odd. 99.; Paris. 1. cons. 1.

c—Crav. cons. 263. col. fi.

d—Bal. 1. cons. 248. et lib. 5. cons. 456.

e—Cow. 3. Inst. Ang. 24. §. pen.

f—Iac. de Zoc. c. omnis utriusque. n. 271. de paen. et rem.

g—Parerg. cons. 77. n. 15. et cons. 100. n. 26; Purp. 530.

h—Burs. 1. cons. 117.

i—Bertr. 2. p. 2. cons. 62.

k—Supra c. 15.

l—Bero. c. quae in Ecclesiar. n. 163. de const.

m—Aya. 1. de ju. bel. 5. nu. 40.

n—Fulg. cons. 149. ad l. C. ubi de crim.

o—Decia. 4. pr. 17.; Ias. d. §. sententiam.

p—Ever. a contr. ad del.; Ias. l. a divo Pio. §. sentent. n. 11. fi.; Aret. I. cunctos populos. n. 13.; Cy. nu. 7.; Salyc. n. 1.

q—l. 6. l. 27. de capt.

r—Sot. 1. de ju. et ju. 3. a. 2.; Cov. reg. peccatum. p. 2. §. 1.

s—Bar. l. 4. §. si dominus. de usucap.

t—Bal. l. 18. n. 11. C. de trans.; Rip. l. rem. quae. n. 1. de adq. pos.

u—§. per traditionem. et §. venditae. Inst. de re. div.; l. 11. de reg. ju.; l. 5. de ju. et ju.

x—Menoch. 6. prae. 16.; Alb. l. 18. C. de trans.; Ro. Ge. decis. 1.
y—Decia. 2. cons. 47. et lib. 3. cons. 72.
z—Corn. 1. cons. 314. n. 3. & cons. 329. nu. 7.
aa—Alc. 1. cons. 11. n. 8. 9. 10.
bb—Ias. l. ex hoc jure. n. 26. de ju. et ju.
cc—Menoch. 6. praes. 29. n. 27.
dd—Hoto. ill. q. 7.
ee—Alex. 6. cons. 183. num. 19.; Menoch. 21. fi. 495. 507. et 6. praes. 15. n. 25. 26. 27.
ff—Corn. 3. cons. 165. nu. 4.
gg—Bar. l. demonstratio. prin. nu. 14. de cond. et dem.; Menoch. cons. 202. nu. 102.
hh—Bar. tract. testim. nu. 30. 31.
ii—Castr. 1. cons. 461. col. 2.
kk—Ias. l. 1. n. 97. 98. C. de ju. emph.
ll—Rui. 4. cons. 38. 45.; Crav. 746. n. 14.; Aret. l. 21. §. 1. n. 7. de acq. poss.
mm—Navar. cons. 2. de injur.
nn—Ro. Gen. decis. 101. num. 1.
oo—l. 1. §. 10. de aq. plu.
pp—Guicc. lib. 5.
qq—Decia. 3. cons. 108. n. 31.
rr—Guicc. lib. 6.

CHAPTER XXIV

Of Inquisitions and the Testimony of Turks

With regard to [a] inquisitions the matter stands thus: They are
not held where money is concerned unless the truth cannot otherwise
be ascertained. Even in the case of slaves this is the established prac- 113
tice, and consequently they are not held even upon a man conditionally
free or in the case of other humble and obscure men. Free men
must not be tortured to convict them here of falsehood, nor yet to
arrive at the truth, unless they are said to be implicated in the deed and
they waver in their testimony. So say the laws; so say the doctors.
What then if our clients wavered? [b] The nature of the proof
ought to be cogent, the details convincing, and so forth. [c] But then
this matter is said to be at the discretion of the judge and there is
nothing left for us to say since we did not see the procedure. [d] If
sufficient proof has not preceded, the confession which may have been
extorted under torture does not injure even those who have confessed,
not even when they persevere in their confession. Always, however,
our presumption should favor the magistrate. But if men suspected
of perjury and accused of crime have already been tortured, all the
more shall we be able to understand that the magistrate had good
reason for his action. [e] The Englishmen themselves, if convicted of
perjury, committed previously and without compulsion of torture,
should by all means be punished; but if convicted of perjury com-
mitted under torture they shall not be punished, since it was not in
deceit but in distress that they lied; [f] and where deceit is absent there
is no perjury. Their distress excuses them also for altering their tes-
timony, which is the same as perjury. Now, I say nothing here about
condoning these confessions. [g] This question has been treated fully
by Menochius and others, but I assure you that I know well the stub-
bornness of the English which leads them to prefer every-
thing else, and even death itself, to torture; while [h] on the other
hand, it is said of the Egyptians and Cappadocians that they would
rather die under inquisition than reveal the truth.

[i] These confessions under torture surely do not injure the mer-
chants to whom the property was said to belong in the former testi-
mony. Nor could the testimony of the Turks hurt the merchants;
nay, it could not injure even the defendants themselves. [k] The law 114
is quite definite on the point of not accepting witnesses of this sort

against Christians, especially in judicial proceedings. Perhaps the merchants would not be injured either, by the invoices inclosed in the bundles which favor the Turks, while, on the other hand, the marks favor our countrymen. You know, of course, that they too are from the Turks; and besides, we should examine the handwriting of the invoices, take into account the place where they were found, and the chance which the Turks had here. [l] There are other points too that we should look into closely, since our merchants will produce their own marks and their own proofs in addition. Likewise they will bring up the question of the records stolen from them, [m] which would be an evidence of the weak case of our opponents. In the meantime since the process has not only gone unwitnessed by us but has not even been completed, we have nothing else whatever to say. If the merchants should present the better case in proving their rights, they will not only put themselves in safety but set the prisoners free. The better proof will overcome everything.[1]

a—l. 9. l. 15. ubi Bar. Alber. de quaest.; Duar. c. 1.; Cujac. par. C. eo.; Crav. cons. 137.
b—Non. cons. 99.; Menoch. 1. pr. 89. num. 3. 4.
c—Menoch. de arb. c. 270.
d—Clar. §. fi. q. 55. n. 14. et ibi add. g.
e—Clar. §. falsum. n. 5. et §. fi. 53. n. 15.
f—Clar. §. fi. q. 60. n. 22.; Menoch. 5. pr. 20. nu. 51. et c. 23. n. 3.; Paris. 4. cons. 169.
g—Menoch. de arb. c. 269.
h—Amm. lib. 22.; Aelia. 7.; item vet. Schol. in Pers.
i—Menoch. de arb. c. 108. n. 15.
k—l. 12. C. de script.; Nell. de test. n. 20.; Bal. c. 21. de testib.; Spec. de teste. §. 1.
l—c. 5. ubi not. de cri. fals.; Cuja. nov. 44.
m—Rom. cons. 346. num. 14.; Decia. 3. cons. 104.

[1] [For an addition to Gentili's argument on this case, see the end of Chapter XXVIII.]

CHAPTER XXV

Of Commerce with the Turks

[a] All the laws apparently say that commerce with the Turks is forbidden. I, however, do not care lightly to depart from the very definite rule of the law of nations [b] which regulated trade relations without making any distinction between nations. Now, other laws could offer no difficulty; they can be answered in many ways, and always truly. Those laws, whether civil or canon, do not affect the subjects of England, except in this way, that the English are not allowed to have the trade relations mentioned with the enemies of the Roman Empire; these laws do not so affect the English as to make it just as unlawful for them to trade with the enemies of others as with the enemies of England herself. [c] Add that between princes
and also—and this is our case—between a prince and the subject of 115
another nation it is the practice that the civil law should not apply but rather the law of nations alone. Or why should those laws which are now under discussion be heeded when they are no longer in force, but are dead, abrogated by opposite usage? See, I have given two replies. The third is that our King approves of the commerce, and, accordingly, it will be just as lawful as if the man who issued those laws were now to approve personally of the commerce and order his laws to remain in abeyance. The fourth reply is that the Englishmen were merely on the way; they had not yet completed the transaction. The fifth reply is that this act is very many steps removed from being of any direct help to the Turks, and that therefore this trade would not be forbidden. The sixth reply is that it is not possible to see any evil intent here on the part of our clients against the Tuscans or other Christians. The seventh reply is that it is conveyance to the Turks that is forbidden, but this is a case of conveyance from the Turks, the transport of Turkish merchants [d] where gold is taken from them through the action of the civil law. The eighth reply is that we are not here dealing with goods or merchandise that is contraband. The ninth is that this is not a state of war which exists between Tuscany and Turkey; they are merely raiding against one another. [e] War is a lawful struggle and a struggle in the full sense of the term.

The tenth reply is one that will overwhelm every opposing argument as with a monster wave, that the Tuscan in his wisdom

will not endure this attack on the commerce of England. He will refuse to have the English robbed through his instrumentality of that which their own King gave them. This same great Duke of Tuscany will laugh out of court those considerations which make against this commerce.

Do we not hear that everything else is brought forward against our clients? A certain argumentation of ours against Hanseatic people shall not here in the present suit be twisted against us; in this present case, I say, where commerce would be blocked forever,
116 if the reason for hostility toward the Turk were felt by the Tuscan to last forever; and it would be blocked, not by war, but—the absurdity of it—by mere raids; and it would be blocked when there is absolutely no question of Tuscany's safety, etc. Now all the contrary considerations were present in that Hanseatic case. [f] The doctors are very prudent in saying that an argument based on precedents is weak for this reason, among others, that we do not know the exact circumstances of the cases cited.

Then we have the consideration that our King does not have any perpetual enemies, so that it would not be fair for him to be bound against the perpetual enemies of others, since the Tuscan is not obligated in this way to our King. Or, if our King has perpetual enemies, pray, will the Tuscan consent to be obligated to our King against them, against the Roman Pontiff?

a—Vide supr. cap. 20.
b—l 5. de ju. et ju.; Alb. 1. de ju. be. 12.
c—Vasq. ill. 51. n. 30.
d—l. 2. C. de comme.
e—Alb. 1. de ju. be. 2.
f—Menoch. cons. 2. num. 207.

CHAPTER XXVI

Of an English Ship Seized for the Use of the Tuscan and Then Lost

There was an English ship off the Tuscan shore, already loaded and about to sail here to England, when it was seized on the orders of the Tuscan, unloaded, and sent to war and lost on the return trip. Two counts are made against our shipowners, who now demand that they be compensated by the Tuscan for their loss: One, that the Tuscan promised to make good the loss which was incurred in warfare; but the ship was not lost in this way, and thus the inclusion of the one [risk] and the exclusion of the other and the foresight of man would nullify any provision of the law which might have favored our countrymen. The other count against our clients is that the lessee is not legally responsible for accidents.

However, on considering the matter more carefully, I side with **117**
our countrymen, [a] in whose favor, moreover, is the ruling of our doctors expressly concerning the ship which a prince received for his own use from his own subjects. This ship was lost in such a way that the prince is held for the loss. [b] A prince is obligated to restore to his people what he has received from them for the public advantage, whether in war or peace. Now, if a prince is obligated to his own people, how much more will he be obligated to the subjects of another prince? A prince may take here from his own subjects with the best of rights, but not so from the subjects of another.

The two considerations on the other side, mentioned above, have no weight. The Tuscan's bargain was not with the owner of the ship or with anyone else who could make that bargain, and it is the owner who is demanding the return of the ship. Further, those rules about the inclusion of the one [risk] and the foresight of man do not stand in the way. [c] There is the neat reply to both that occurrences involving a similar principle are not excluded; and like them are all chance occurrences; they are not excluded when some one [chance occurrence] is expressly mentioned on account of its greater frequency, and here express mention was made of warfare in which certainly ships are more frequently lost than elsewhere, but there is no exclusion of other occurrences which in the ordinary and usual administration of justice would have been included.

The provision of the law would not be nullified if the provision

made by the individual were made with no intent to introduce a change; which is not presumed, unless this is expressly the point taken into consideration. The rather should this expression be considered superfluous than that a departure from the law was contemplated. And other arguments which are read everywhere in all the doctors—these arguments I have read in Cravetta and Cephalus. The latter makes the statement—striking, from our point of view—that, however the case may be in contracts made according to strict law, in those implying good faith, the case is entirely as I have said in view of the presumption of perfect good faith. [d] Now, a contract involving a lease or a commission does imply good faith, [e] and all
118 contracts that come under the law of nations are of this character; [f] and, therefore, a contract involving a lease certainly comes under the law of nations as does one involving a commission, [g] if all implying good faith come under the law of nations, and a commission certainly implies good faith.

Then consider the fact that our countrymen made the contract in this case with a prince, [h] for contracts with princes, as everyone knows, all imply good faith. Yet why, pray, do we talk of any contract here where the Tuscan took over the ship by requisition and did everything else by requisition? [i] The one who obeys the requisition of a master is not thought of as acting of his own free will. Thus, there is no force in the second objection, based on the nature of leasing, because we have a commission here, [k] in which case he who gives the commission makes good any accident and damages to the person who takes the commission, and he who was not held by any obligation recovers all these things, as Salycetus explains, in the greatest detail of all writers.

Now, all these considerations are not affected by the agreement regarding hire which constitutes a leasing, as Panormitanus notes, because when he speaks thus it is of those who "come" for hire; he does not make a statement to apply to our people who were sent by the Tuscan under compulsion; yea, whose ship was sent under compulsion. Pennensis likewise gave this reply regarding those acting against their will in such a case. [l] Further, this subsidiary contract is said to be part of another, the principal one, and accordingly it has the same legal standing as the principal contract, even though it would *per se* have another legal standing. [m] This procedure is the more equitable and beneficent and should be followed where things forming a whole are concerned.

If this ship was lost through the fault, however slight, of the trustee or his men, it is unquestionably true that the person who gave the commission will be responsible, as we find in Panormitanus whom I have mentioned and in Hostiensis. And here it is believed there

was such a fault on the part of the Tuscan's men who were placed in charge, although unskilled, after the Englishmen, who were skilled in navigating the ship, had been removed. [n] Lack of skill is accounted a fault. [o] Even he is held responsible for any mischance who may have transferred merchandise into another ship equally suitable, against the will of the owner. Accordingly the Tuscan would be held 119
responsible for any accident to the ship, since he set others to navigate it against the will of the owner. Succor should be lent to those acting under constraint, and our countrymen would be regarded as acting just as much under constraint in the accessory matter of hire, since it was under constraint that they left the Tuscan their ship. [p] "Hire from him who can command brings the compulsion of necessity," as a great writer puts it.[1]

a—Luc. Pennen. l. 2. C. de na. non exc.
b—Alb. 3. de ju. be. 3.
c—Ceph. cons. 257.; Crav. 442. 527.; Menoch. 4. praes. 89. n. 90.; And. ab Exe. c. canonum statuta. n. 148. de constit.
d—§. actionum. Inst. de act.
e—A. Burg. c. cum causa. de emp.
f—l. 5. de ju. et ju.
g—Burg. c. 1. nu. 50. de plus pet.
h—Alb. 2. de ju. be. 4.
i—l. 4. de reg. jur.; Ceph. cons. 76. n. 42.; Menoch. 2. pr. 19. n. 8.; Aret. l. cunctos populos. nu. 7.
k—Inn. Pan. alii c. 29. de jurej.; Cy. Saly. alii. l. 6. C. de vi.
l—Anch. cons. 72. Tantam.
m—Rui. 1. cons. 113. in fi.
n—l. 9. §. pe. loca.; l. 175. de reg. ju.
o—Strac. manda. num. 43.
p—Tacit. ann. 14.

[1] [For an addition to Gentili's argument on this case, see the end of Chapter XXVIII.]

CHAPTER XXVII

Of an English Ship Which Fought with a Tuscan Ship and Was Captured

The English ship was captured in battle by a Tuscan ship and confiscated. Now the judges in Florence say that the explanation of the verdict is that our vessel went to attack the other, while the other did simply what was necessary for defense.

Pardon me, your honors, if I reply that there seems to be neither any probability in the premises on which the verdict is based nor any truth in the conclusion. [a] You must admit that he is presumed to be " the aggressor " who thought that he had suffered some wrong. Even mere opinion would suffice here where the intent is in question. Now, the Tuscan might have thought that he was being wronged by the commerce of the English with the Turks. He is presumed to be " the aggressor " who is under arms and waiting. Now the Tuscan was the person who, as it appears from what was done with other ships of ours, was awaiting just such merchant vessels of ours. [b] " He is presumed to be the aggressor " who is stronger than his opponent. And who does not see that the Tuscan ship was stronger than our merchant vessel? [c] He is presumed to be " the aggressor " who is accustomed to brawl and who carries weapons. Is the soldier such an one or the merchant? In fine, that person is presumed to be " the aggressor " who, besides fitting the hypotheses
120 just mentioned, is the victor. Who is such an one? What are we seeking? Even the verdict recites that the Tuscan vessel fired two broadsides first; and so might not the Tuscan vessel be responsible for the engagement? [d] He who gave the challenge to battle and to wrath is held to have begun it, and the prince from whom the malice originated is adjudged to be in fault, and, therefore, everything which may have followed is imputed to him as the aggressor.

Why, your honors, would my opponents say that it is the custom and sign manual of friendship to discharge a broadside once and yet again? [e] It is the custom of a warship which is challenging a vessel, and it does so to assert its authority. This treatment the Tuscan ships were meting out to other vessels also at that time. Therefore, the defense of the English was taken against interference and threats. " The Tuscans wished to examine our ship, as is patent from their treatment of others. Therefore, they were coming to interfere with the voyage of our people and to intercept their trade, as is patent

from their treatment of others." [f] Deeds reveal the will behind them, and this deed of the Tuscans is unjust, [g] if it is true that not without committing wrong the hunter trespasses on another man's estate in the face of the owner's prohibition, and if it is not lawful to harm an enemy on neutral territory, [h] and if territory is simply domain. Let not that custom (in regard to this authority of warships)—if it obtains anywhere—be thrust upon me now as a law of the sea, since that custom may be admitted off the coasts of the prince who owns the vessels, but not on another sea. [i] Further, no regard should be had for those doctors who talk freely about the custom, but the view of the rank and file should be observed.

[k] "The defense of the Englishmen was proper, because they feared offense, [l] and simply because the other man is making ready to attack me, I may lawfully take the offensive and slay him. Of course, I do not have to wait till I am attacked; it is my duty to begin myself." This is said to be the more humane view, a view
tested in accordance with facts in the courts, and "approved, more- 121
over, by all the doctors." [m] "One should anticipate offense, that which is potential as well as that which is actual."

The defense made by the Englishmen was honorable also in behalf of the Turks, who certainly would have been molested on board the ship of our countrymen by the Tuscans. [n] Thus wrong is done to us when it is done to another who is in our home, [o] for a ship herself is likened to a home. [p] Thus likewise we regard a wrong inflicted on our traveling companion as inflicted on ourselves. Defense offered in protection of those whom we had undertaken to carry would have been praiseworthy; nor were we undeserving of mercy, even though the passengers may not have been.

The defense offered by our men was necessary, because it was in the fear that they themselves, along with the Turks, might suffer some injury, and from the desire to save their property that they rushed to arms. [q] "This was the reply given by Cravetta in a more hazardous case where a city closed its gates in the face of its sovereign through fear of being sacked, and to save its property and to prevent the vast majority of its innocent people from being involved in the fate of a few who were guilty." [r] But, then, if our people simply defended themselves and that defense was justified, then the offense of the Tuscans was unjustified. Or, suppose that the offense of the Tuscans was justified also. [s] "At least in the doubtful conflict between a justified offense and a justified defense there is no one who will not give such a beneficent thing as defense the preference over offense." The more just surpasses the just, the more equitable, the equitable, the more beneficent, the beneficent, and the more just is given the preference over the just.

Or, even suppose that from our people came the offense and that an unjust one. Should the surrender agreed on not have helped them? [t] You admit that they have not been captured who have surrendered even from the direst necessity. Or, even suppose that they were captured. Pray, have persons and goods when captured become the property of the captor? Of course, we are to some extent at war
122 with the Tuscans and this was a battle between enemies, which in these circumstances would be judged in accordance with the public laws of war, but they should not be held guilty of wrongdoing and murder like pirates. [u] On the other hand, the learned Alciatus and the clearest principle of law both rule that neither the persons nor the goods captured become the property of the captors. Not even the goods, you ask? But they did not belong to those who fought. [x] "Now, the act of these sailors does not harm the owners," [y] since the former are not understood to have committed wrong in accordance with the instructions of the latter, and the latter seem to have given their instructions simply after the manner of merchants. [z] "The owners would not suffer harm, even if the sailors said that they acted in accordance with instructions." See how even with this liberality of mine in making defense the sailors can scarcely be harmed—and the owners not even as much as that. But indeed, since the sailors simply defended themselves and that defense was on every count justified, what conclusion can we reach except that the Tuscans should make good to us [aa] as people who have been despoiled, everything that has been taken away and the losses incurred, the expense, the interest, the profits, and so forth, to the last penny?

a—Menoch. de arb. ca. 363.
b—Decia. 3. cons. 67.
c—Decia. 3. cons. 75. 104.; Bero. 3. cons. 173. 194.
d—Bal. 2. cons. 143.; Scot. resp. 25. lib. 3. 10. 2.; Crav. cons. 2. num. 12.
e—Facius. lib. 10. de re. ge. Alf.
f—Menoch. 6. p. 35.
g—l. 3. de adq. re. do.; l. 16. ubi Ang. de se. ru. pr.
h—Bar. l. 47. de fur.; Bal. l. 10. C. eo.
i—Alc. 5. cons. 25.
k—Alb. 1. de ju. be. 14.; Eug. cons. 90.
l—Ias. l. ut vim. n. 9.
m—Alb. d. 14.
n—Non. cons. 108. num. 18.
o—Stra. 2. de nau. 5.
p—Decia. 3. cons. 125. n. 16.; Non. cons. 101. n. 11.
q—Crav. cons. 595.
r—Alc. 5. cons. 132. num. 58.
s—Crav. cons. 2. n. 16. et cons. 432. num. 15.
t—Alb. 2. de ju. be. 17.
u—Alc. d. 132. n. 17. 18.
x—Com. cons. 5.
y—Rip. de rescr. con. 17.; Menoch. 3. pr. 43. n. 8. et lib. 5. pr. 27.; Decia. 3. cons. 68. 88.
z—Decia. 9. pra. 30. n. 43.; Menoch. 1. prae. 89. num. 75.; Ceph. cons. 113.
aa—Alc. d. 132. n. 59.; Crav. 140. num. 3.

CHAPTER XXVIII

Passage-Money Is Owed for the Turks Captured by the Tuscan on an English Ship

The Tuscans who captured their enemies, the Turks, and their goods on the ship shall pay in full to the Englishmen the fare which the Turks would have paid to the English ship at the place agreed upon; [a] for the victor takes the place of the vanquished, and any and every possessor is bound by an hypothecary action, and for passage-money everything is subject to a lien. [b] The Tuscan is held for the whole fare, no matter what may have happened with reference to the persons and property of the Turks, not as a result of the 123
situation of our men, but as a result of their own situation. [c] The claims upon property go with it when it changes hands. [d] The victor comes under the law that applied to the vanquished. Tell me, would not the Tuscan be willing to accept a claim of the vanquished Turks, if they had had any of a like kind on the goods of the Englishmen? [e] He would be quite willing, you may be sure. Accordingly, he should be willing to accept the present state of affairs, when he would have done so if the situation had been reversed. He should be passively willing now to accept what then he would have actively willed to receive. [f] The rule is, according to nature, that a loss should be felt where a gain was expected. This in brief in regard to the law. Now, if, as the story goes, our countrymen actually had an agreement to this effect with the Tuscans, so much the clearer and more definite would the case for our countrymen be.

A slight addition for the end of Chapter XXVI.—Then, too, the great Duke, with that generosity of his which he promises our countrymen unasked, will take into consideration the fact that our men who were skilled in navigating the ship were taken from it and others unskilled were put in charge of its navigation. I mean the English ship which others not Englishmen lack the skill to navigate as well as those who are accustomed to do so. Lack of skill is accounted a fault, and if there is even a slight lack of such skill, the lessee too is held responsible. This is certain. If I knew the men whom the Tuscan put in charge I would say whether they are skilled; [g] for he is skilled who has thrice acquitted himself creditably; he is thoroughly experienced, a master, etc. One should consider the place where the ship was lost, to see whether a skilled navigator would have lost her

there. One should consider the mischance itself to see whether it was such that even a skilled man could not have prevailed against it. Other points should be taken into consideration with reference to this skill which is recognized only with great difficulty. This skill the Tuscan should prove existed, for mischance and overmastering force are not taken for granted; [h] nor yet again is skill taken for granted unless proven, since it does not come naturally, but is the result of study and practice.

124 *A slight addition for the end of Chapter XXIV.*—With reference to the handwriting of the invoices, note that it is brought out in the process that it is not on Turkish but on Christian paper. Therefore, it is clear that it was not written in Turkey, and the Turks perjure themselves in asserting that it really was. [i] Thus perjury is manifest if the date written on the paper goes back to a time when there was no such paper; and the argument from the thing may be extended to include the place.

a—Hot. ill. 5.; Alb. 3. de ju. be. 5.
b—Bar. l. 27. §. culpae. loco.; Dec. alii. l. diem functo.; Alex. 2. cons. 168. num. 9.
c—l. 23. §. 2. de se. ru. pr.
d—Io. A. Spec. rub. de feu.
e—Alb. 3. de ju. be. 5. et 2. de ar. R. 3.
f—l. 10. de reg. jur.; Ceph. cons. 567.
g—Alc. l. 1. §. ult. n. 34. de V. O.
h—Menoch. 3. pr. 138.
i—Cuja. Nov. 44.

[THE END OF BOOK I]

THE SECOND BOOK 125

OF

THE PLEAS OF A SPANISH ADVOCATE

OF

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CHAPTER I

Of the Deposition of One Who Is Absent

One of our witnesses offered his testimony in writing to the judge. The assertion was made that it was of no value, and this was what I thought. [a] Indeed I read our doctors, and I found that all the writers on canon law and that others uniformly report that they are led to hold this view by many cogent arguments; in the first place, by a letter of Calixtus, which leads, as it were, to a direct conclusion. In it are these words: [b] "Witnesses should not give their testimony in any written form whatsoever, but should present it in person and orally." [1] In the second place, the rescript of Clement III is cited: [c] "We have been asked whether, touching an accusation involving matrimony, certain persons who offer no testimony by word of mouth should be allowed to appear by means of a mere statement in writing on a piece of paper. To this we reply that in such cases, except by way of presumption, a written statement is of no weight, so far as reaching a decision is concerned, unless other legal confirmation support it." [2] Now, it is to be observed that both decretals reject written documents of all sorts and require 126
an oral statement and word of mouth.

In the third place a rather strong argument is drawn from both decretals, to the effect [d] that a judge ought to consider the voice of the witness and should observe the agitation which he feels, and shows in his speech, and should interrogate the witness in person, and points like this are noted which would not be in his power in the case of one who puts his testimony in writing. Likewise they even maintain that in an inquiry a representative should not be admitted in the case of criminal action. [e] "We blush at saying many things which we do not blush to set down in writing," says Baldus. [f] "For a letter has no blushes," says Cicero.

The fourth argument is [g] that a discourse worked over colors evidence, and a written discourse would be one which had been worked over. Now in consequence of this argument, Felynus in a vigorous way and the teacher of Felynus ([h] Franciscus Aretinus) support the view of Salycetus, [i] who says that he does not approve of such a witness, even if he in person read to the judge the document in which his testimony is contained, because (they say) such a wit-

[1] [*Decr.*, 2, 3, 9, 15.]

[2] [*Decrtl.*, 4, 18, 2.]

ness seems to submit a statement which has been worked over. But they are also led to this conclusion by the argument mentioned above that the expression, the color, and the steadfastness of a witness are observed better when he testifies without reading from a manuscript. Salycetus himself took the position that the words of those who gave evidence should be set down in writing by a notary. To this point, however, Aretinus replies, as well as to another point made by Salycetus. [k] Furthermore, Baldus urges this point also that a document sent to a judge would " in no wise " establish a point, even if the witness in question had taken an oath in advance in the trial. [l] Indeed Albericus makes even a more sweeping statement that it would not, if the witness in person should bring the document to the judge and swear that the truth was contained therein. [m] Consequently, Archidiaconus makes the general statement that if witnesses are absent and that if their testimony is in writing they ought " never " to be believed.

Now, the fifth argument is that of Aretinus. He makes the
127 new and very sound deduction from can. *relatum*, 5, qu. 2 [1] that the same prohibition should apply to the prosecutor and the witness, viz., that the prosecutor should not be absent, and that the witness should not be absent and give his testimony in writing, and that, therefore, there would be " no " legal evidence in the one case, just as there " is no " accusation " under the law " in the other case.

[n] The sixth argument is that others, too, would call this testimony of almost no value. " Then shall he, whom no one would believe if he should take an oath while laying hold of an altar, establish without an oath by means of a letter whatever he wishes? " Cicero says " by means of a letter." Apuleius in his well-known " Apology " before the court, upon which my brother makes an observation in this connection, says " from a pamphlet." Now these are all the points against this witness of ours which I have to discuss.

However, there are other points in his defense which would make this evidence acceptable. [o] There is Bartolus, who writes to this effect: " Pray, may a witness present his testimony in a written form? I think he may do so. Still if the judge should wish to see him and to hear him speak, he may well do so, because he will see whether he speaks in an agitated way or not." [p] Moreover, Alexander and Mynsingerus agree with Bartolus, and Decianus does so in a very decided way, for he is vigorous in extolling the authority of Bartolus. He even thinks that more credence should be given to this one writer, as Angelus Aretinus used to say, than to all others. [q] About the same authority Decianus also says elsewhere: " Whatever Baldus, Salycetus, and the others seem to maintain in opposi-

[1] [*Decr.*, 2, 5, 2, 3.]

tion, still it is enough that Bartolus, a jurisconsult of great authority, thought this." But I pass over these points. I say nothing in addition about the authority of Alexander. I do not rest my argument especially on the fact [r] that here and there Baldus and Butrius have held the same view as Bartolus. I fight the battle in other ways.

[s] In the first place there would be the consideration that the edict concerning witnesses is permissive. Therefore, to my mind, for a like reason the edict concerning testimony would be permissive, and what we do not find expressly forbidden and disapproved it is right to do. But this matter about which our discussion centers has not been prohibited, as my brother also confesses. 128

The second reason is that, since a witness (at least in civil suits) may refer to what has been said before, even if what has been said has no point—[t] this is the common opinion—therefore, a witness may refer to what he has written, and this parallel Alexander, Mynsingerus, and others draw. [u] Even Panormitanus says that a witness may refer to what has been said before, so as not to involve himself through forgetfulness in the crime of perjury. This reason is valid here too. Panormitanus also says that an appeal which the appellant has reduced to writing and presents to a judge is valid, even if the appellant should not read it, for he seems to satisfy the requirement of reading it by basing his case upon it. The like situation here may constitute the third argument.

The fourth argument is drawn from the ruling by the same writer to the effect that notaries, when bidden to announce a contract, satisfy the order if they bring the documents and leave them with the judge.

The fifth consideration is that the evidence of those who are absent is not altogether rejected, [x] but the authority of witnesses who appear in person is said to have a certain value, and testimony which we are in the habit of reading has a different value, so that the authority of such testimony would certainly be worth something. Besides, the question in this case does not even concern one who is absent, but one who is present and presents his testimony in writing to the judge after taking an oath.

The sixth argument is drawn from law 14, *De dote praelegata*,[1] itself in consequence of which Bartolus sets down there this opinion of his, and in it we read of valid written testimony. It is valid in that case without doubt if the judge had to reach a decision in accordance with it. Panormitanus is utterly absurd in saying that the testimony was valid there because it was not contradicted. Who revealed this fact to him? How is that probable? Since, if the testimony had been contradicted, it would not have been approved? Is this Panor-

[1] [*Dig.*, 33, 4, 14.]

mitanus? And in begging the question he takes a stupid course. Even the other point [y] which other writers also have is not apposite,
129 that Pollianus in that case is not a true witness, for even if the doctors regularly write that in this law it is laid down that the testamentary disposition, based on the unspoken wish of the other person, is valid because of the special favor shown the dower right—and so Pollianus would not be a true witness—still this interpretation is absurd. [z] Alciatus shows this, and the fact is clear today to all who know the absurd explanation of the captatory disposition of property given by all the old interpreters who say that an arrangement which has been based on the wish of the other person is captatory. Besides, it is very silly for Menochius and Covarruvias to say that in quite a large number of emended manuscripts the reading is not *iuratus scripsit* (he put it in writing after taking the oath) but *rogatus respondit* (he replied when questioned). Covarruvias says that *iuratus scripsit* can even be explained as *propria manu subscripsit* (he signed with his own hand), or that the discussion in that connection does not concern a witness who deposes with the solemnity which accompanies judicial procedure. This last point is the same point as the first one of Panormitanus, and it is besides disproved by these words of the law, i.e., *pro marito iuratus*. Aretinus foolishly explains them as meaning in the presence of the husband, outside the courtroom, *a marito puellae iuratus* (having been sworn by the husband of the girl). These proceedings are conducted in the courtroom, since it is always the custom to administer an oath to a witness in the courtroom, not outside it. Likewise also it is disproved by these words, *eum cuius notio est aestimaturum* (he who conducts the examination will estimate). They indicate that the transaction takes place in the courtroom, if they have not been put in tautologically by Scaevola. [aa] Pollianus is a true witness also. All of them call him everywhere a witness, and no reason can be given why he should not be so considered. Thus the opinion of Bartolus is on my side. In support of which I add that the Venetians are said to observe the practice regularly of having a witness give his testimony in writing, as he who added the supplements to Panormitanus bears witness. In this connection, in point of fact, Ludovicus Romanus says that the usage of a place may make valid a method of proof which is invalid under the law. [bb] In the Kingdom of Bohemia, in the Archduchy of Austria, in Bavaria, and elsewhere the practice prevails of allowing noble and
130 distinguished persons to send to the judge a written and sealed document attested by them. We understand that this method of giving evidence is not objectionable. What was the usage at Rome? There the practice mentioned seems to have prevailed, as we infer from the words *testimoniorum quae recitari solent* (testimony which is

usually read out). The conclusion follows too from the fact that Hadrian says that there is no place in his court for "written" evidence, for he indicates clearly enough that there is a place for it in the courts of others. [cc] Indeed, on the basis of that law, Cujacius and Brissonius make the observation that this was the situation after the downfall of the Republic; they add that while the Republic continued absent persons, even by means of a written document, did not give evidence in public trials, but they were required to give oral evidence in person before the court. "In public trials," they say. Therefore before other judges even while the Republic lasted it was not the practice [to exclude written testimony]. [dd] Now I give in addition these words of Harmenopulus: "When accusations are made it is undoubtedly necessary to produce the witnesses. Their statements do not suffice." Consequently, if in criminal actions it is necessary for the witnesses to make a personal appearance, in civil actions it is not necessary. This would be the eighth reason offered in support of that party which we are defending, and this party would not be put in the wrong by the reasons given on the other side.

Now, the first reason does not stand in the way, [ee] since even the authority of the *Decretum* would not be so cogent as to make law. Calixtus is not even speaking of the situation which confronts us; he is speaking of absent persons, but our case concerns a witness who is present and tells in a continuous written narrative what he knows in the case.

The second argument does not stand in the way, because Clement is talking of a special case, as we noted, of an accusation involving marriage. "Concerning an accusation involving marriage" is the issue there; "in such cases" is the response there; "in a matrimonial action" Panormitanus would understand the topic there. Now I was just saying that there were cases under the Roman Republic in which this testimony would not be admitted, that it was not admitted in criminal actions. The case discussed by Clement would be criminal. 131
It would be a matrimonial case which is regularly treated like a criminal matter even in this connection, [ff] and it is also a special characteristic of matrimony that proofs which are valid in connection with another subject would not be valid here. Besides, as all writers observe, the question there concerns divorce so that the proofs required should be so much the stronger and more particular. I would say that that chapter deals with an accusation, not with testimony, and that it has been put under the title on accusations, and that the part of the rubric which has to do with testifying is lacking in some books. [gg] Moreover, as we are in the habit of accepting witnesses more readily than judges, so perhaps they ought to be accepted more read-

ily than judges. The reasons are common in both cases, for the material which makes up the proofs is often lost, if it is curtailed. [hh] Now, in the matter of admitting an accusation in writing against "no one," elsewhere also the canons and laws say, "in writing it should never be received," etc.; still the first response is more definite, for the reason of Aretinus, the fifth argument urged against us, is in striking opposition to this later response. Still we will reply even to that reasoning later.

Now to the third point comes the reply, [ii] that in reality the entire examination of witnesses in such cases has been put at the discretion of the judge, and he ought not even to do that which the first proposition of the argument calls for, since we see that everywhere such an examination under the law is intrusted by the judge to others. [kk] From this circumstance Nellus also maintains that this reasoning about the countenance and about hesitation would hold in criminal, not in civil actions, since in civil actions the judge can intrust the examination of witnesses to another person. There are like points too in his writings, in his treatise "On Witnesses," where he also supports the same position as we do in the question itself. But, further, the second proposition of the said argument is not defensible, because it may chance that even a man who has written his testimony may be agitated, may grow pale, may falter, when in person, in the presence of the court, after taking an oath, he offers his docu-
132 ment to the judge. This proposition may hold when the writer of the document is absent. All the arguments on the other side deal with one who is absent, whether witness or prosecutor. In other words, we are required to make an accusation in writing, although we are forbidden to make it in written form [only], i.e., as I have said, in a document, in a letter, in sealed form, [ll] as Harmenopulus says. I repeat this second opinion of his, which also seems to count against us: "If anyone offer the deposition of a person in sealed form, such testimony is no longer to be accepted." But he is also talking of an absent witness whose deposition another person presents. [mm] Testimony which is given by one who has not taken an oath is forbidden, witnesses are those who have taken an oath, as the canonists explain the difference between testimony (*testimonia*) and witnesses (*testes*); [nn] and the writers on civil law are entirely in agreement with them. Now, this man who has been sworn also is considered our witness. Even the point mentioned above about faltering would not be so strong, [oo] since often people are agitated, grow pale, and do other things of this sort through weakmindedness, etc. [pp] On the other hand, others bear themselves in this situation with boldness, with unchanged expression, and they even, though ready in replying, at times show diffidence in speaking, tremble and

grow pale, and indeed, although they are speaking the truth, they hesitate, they support themselves on something, they measure all their words, as everybody should who regards the sacred character of testimony and the sense of honor attaching to it. They know what the force, what the authority, what the weight of this whole matter is. The rest, with no regard to all these considerations, unmindful of religion, indifferent to the deity, are in no wise influenced in giving evidence, even when it is thoroughly false. To this effect Cicero speaks of both these classes of people in two orations.

Now, let the reply to the fourth argument be that a written discourse is not the worked over one to which the law objects in the case of witnesses. Objection is made to that discourse which has been composed by several witnesses so that all of them may seem to 133
be in harmony and speaking the truth. Consequently, the law does not speak at all of one witness, but of several witnesses: "Whether they have submitted one and the same prepared statement." A prepared statement of another sort would not be objected to. The binding character of an oath, the authority which testimony has, call for it. "Remember, judges, with what labor you are in the habit of exerting yourselves not only as to what you may say by way of evidence, but even what words you may use, etc.," as one reads in the same writer, Tullius, in his oration for Fonteius. [qq] Our writers even say also that a witness who speaks fluently is presumed to be suborned. Still I do not fail to notice Budaeus' note to Accursius in that connection on the word "extemporaneously" contained in the law. But the law, with the interpretation of Budaeus, disapproves of a witness basing his replies on a note book; it does not object to prepared testimony. The judge may interrogate this witness, if he wishes; he will reply extemporaneously; this questioning the opinion of Bartolus presupposes. The witness appearing in person with a document has communicated his willingness to repeat everything in a new examination, and by word of mouth. Here the judge, to my advantage, may have recourse to Decianus, who reaches the conclusion that when a judge can recall a witness of this sort and remove this obstacle he ought surely to do so ([rr] this opinion also other writers have previously held), since the judge, so far as he can, ought to help build up, not overturn, proofs.

The reply to the fifth argument, that of Aretinus, is that he is speaking of the case of an absent person. Different is the case of a person who, though present, has to make the accusation likewise in a document. Therefore, a witness is not comparable with him, for a witness does not have to give testimony with such formality. I suppose this situation also results from the favor shown to the giving of evidence.

The reply to the last argument is that, in the case of an absent person, it is a maxim that mere unsworn statements hold, and yet not without tending in that case to decrease the confidence put in the evidence, for that this testimony creates a presumption at least Hostiensis,
134 Butrius, Felynus, and all late writers teach, according to Vivius, and indeed they teach it in harmony with Clement. In this case, moreover, and in certain other cases the opinion of Bartolus is held to be correct also by others. [ss] It is held to be correct in the case of a man who cannot speak, and this point Bartolus observed also, but so as to retain in general his view—that it would not be a substantial element in testimony that it should be given by word of mouth, if it can be given otherwise. For the substance itself would not change. [tt] It is commonly held to be a correct procedure if the witness in person even read his testimony; in the case of an incident which is very involved; where one fears discrepancy and inadvertence, as Felynus and Aretinus teach, and as we say for the same reason in the case of any witness who distrusts his memory, even in connection with an incident not very complex. It is held to be correct if the witness is not under suspicion, for in this case the argument of those who maintain on the other side that the truth may be inferred from the change in color and from vacillation, loses its force, as Decianus says. And this establishes the rule here, in keeping with the opinion of Bartolus, for such the rule would be, in order that every man may be presumed to be honest and truthful. But there are also other reasons for holding it to be correct which I pass over as less apposite here.

a—Panor. c. 2. qui ma. ac. po. c. 29. ubi et Fely. de testi.; Cujac. d. 2. et p. D. de testi. ct Nov. 90.; Alb. l. 10. de quae.; Rom. l. admonendi. et con. 204.; Rip. l. 1. prin. n. 27. de V. O.; Cov. 2. resol. 13.; Rui. 5. cons. 110.; Turret. 1. cons. 86.; Viv. co. op.

b—c. 15. 3. q. 9.

c—d. c. 2. qui ma. acc. po.

d—l. 10. de quaest.; l. 3. de testi.; Fulg. l. 33. §. 1. n. 11. 12. 15. de procur.

e—Bal. rub. de testi.

f—Cic. 5. fam. 12.

g—l. 3. de testi.

h—Aret. d. c. 29. n. 22.

i—Saly. l. 8. C. de testi.

k—Bal. l. 3. C. de re. cr.

l—Alb. l. 8. C. de test.

m—Arch. c. testes. 3. q. 9.

n—Scip. Gent. apol. Apui. not. 484. et 583.

o—Bar. l. 14. de do. prael.

p—Alex. l. 19. de leg. 1.; Myns. 1. resp. 3. et 3. obs. 64.; Decia. 2. cons. 51.

q—Decia. 1. cons. 41.

r—Bal. l. 3. de. testi.

s—Bal. l. 1. Alb. 3. de testi. gl.; Dec. c. 1. Host. c. 38. eo.

t—Bertr. 1. p. post. cons. 165.; Decia. 2. cons. 66. et lib. 3. cons. 128.; Menoch. de arb. cas. 109.; Gail. 1. obs. 104.; ro. Ge. decis. 105.

u—Panor. 1. cons. 28.

x—l. 3. de testi.; Basil. 21. tit. 1. §. 3.

y—Ias. rep. l. admonendi.

z—Alc. 2. parer. 19.; Menoch. cons. 408.

aa—Rui. 2. cons. 21. n. 1. 2. 3.; Bal. l. 15. n. 5. C. de test. mil.

bb—Gail. 1. obs. 101.
cc—Cujac. parat. de test.; Briss. 5. de for.
dd—Harmenop. 1. tit. 6. §. 6. 21.
ee—Alb. de li. ju. ca. c. 2.
ff—Alb. 7. de nupt. 3.
gg—Spec. de teste. §. 1.; Ias. l. 1. de re jud.; Alb. l. 18. de ju. fi.; Dec. c. 1. de judic.; Pan. c. 6. Fely. 54. de testi.
hh—c. 2. 3. q. 9.; c. ult. 20. q. 8.; l. 3. de acc. et d. c. 3. 5. q. 2.
ii—Alb. rub. de testi. n. 4. et l. 3. prin.
kk—Nell. de testi. n. 90.
ll—Harmenop. d. tit. 6. §. 65.
mm—Host. c. 7. de frig. c. 7. de dol. c. 2. qui ma. acc. po.
nn—Alb. l. 3. de testi.; Castr. l. 3. C. eod.; Alc. 4. de V. S. fi.; Menoch. 1. de prae. 1.
oo—Menoch. 1. praesu. 89. n. 72.
pp—Cic. pro Flac. et pro Font.
qq—Fely. c. 27. de test.; Menoch. cons. 149.
rr—Nell. de testi. n. 125.; Bar. auth. at qui. C. de prob.
ss—Spec. de teste. §. 7.; Anch. c. 29. de test.
tt—Viv. com. opin.

CHAPTER II

Of Money Given to a Witness

All the [a] doctors assert that the expenses of witnesses should be paid. [b] Therefore there is no doubt that money for these expenses may be promised to them. Indeed, [c] as Ancharanus says, it is not the pay which is forbidden, [d] and therefore to have induced witnesses to come and testify, by offering them money, would not be a
135 proof that perjury had been solicited, because money may be given to meet the cost of travel and to cover expenses. [e] In the matter of expenses those which the witness may have incurred at home are not deducted, as the more commonly accepted opinion runs. Money may even be paid him to compensate him for the work which he has lost, the work on which he supports himself and his family, as Felynus remarks in following an opinion expressly given by Baldus. [f] To Felynus I add Fulgosius, as well as Andreas Gaillius who, besides other authorities, cites the Delphinal practice. He says too that this custom is very just and quite reasonable. Felynus too, in following Baldus, remarks that it is lawful even to give money to a witness to compensate him for the losses which he has suffered, for instance, if he has been robbed by highwaymen while coming to give his testimony, and when money is given in this way the value of the evidence is not weakened.

Now, it is of no moment [g] that Francus and Gaillius whom I have mentioned seem to write in opposition to this doctrine that no regard should be paid to the time or the emoluments which a witness may lose because of his absence, since a witness should not look for gain in giving testimony, but should support the truth without recompense. Francus writes that a mistake is often made in this matter because witnesses allow not only their expenses to be refunded but their losses also to be made good, or they ask to have it done. He remarks that this is contrary to the explicit dictum of Baldus, which should be borne in mind, and that it violates the prohibition of the law which allows the payment of expenses only. Consequently, he would not approve of the testimony of a man who, outside of his expenses, receives anything in violation of the prohibition of the law. These points are of no weight, I say, [h] since Baldus in the passage cited by Francus and Gaillius says: " The expenses, but not the losses, of witnesses ought to be defrayed."

Whether they ought to be is another question from the one before us, whether they can be, as Felynus in harmony with Baldus properly notes by way of distinction. Now, the reason which Gaillius gave is not well based, since the point which he proposes for discussion concerns the avoidance of a loss, while the conclusion which he draws has to do with seeking gain. Moreover, the law grants expenses and compensation for lost labor; as the dictum runs, "let him give 136
expenses." [i] It does not forbid the further giving of money later on, provided it has not preceded the agreement.

We say further that the corruption of a witness is lawful. [k] A witness may be led by a reward to testify to the truth, if he would otherwise refuse, as, following Archidiaconus and Baldus, other writers assert without hesitation. [l] Archidiaconus speaks to this effect: "Hugo says that it is lawful to make a gift in public to secure a just verdict and true testimony. The laws which stand in the way apply when it is doubtful with what purpose the gift is made, according to Laurentius." [m] Baldus says that this is by way of precaution, not for purposes of corruption. Furthermore, Ripa clearly observes that the reason for this ruling is that a witness who refuses to testify is presumed to have been corrupted, [n] as Panormitanus says, and as Ripa adds, by a party—the one for whose advantage it would be, as I add from a correct [o] old formula. Consequently, Ripa concludes, by corruption from the other side he can be induced to testify, [p] since it is lawful to thwart fraud by fraud and, therefore, would be so in a trial. Joining with Baldus, I would say that what is a matter of precaution is not corruption. [q] It is a case of corruption and it is unlawful when a person, seeing that he is attacked by perjured witnesses, fights back in the same way, with perjured witnesses. [r] I know the assertion is also made that a witness receiving money, even though he testify to the truth, commits perjury. But this conclusion would apply to the witness himself, not to the man who calls him, nor to the evidence, if principles which have been accepted in the past are recognized now. It stands to the credit too of the man who calls the witness that he has given the money publicly. The fact that the transaction goes on in public clearly removes the suspicion of evil intent, as Menochius has explained even in this case. When the intent with which the money is given is doubtful, then the laws which forbid giving apply. The demand of Felynus, in company with Hostiensis and Butrius, whom he cites, that the judge be informed in this matter of refunding expenses or losses as a safeguard against evasion of the law, is justified only 137
when the transaction does not take place in public, and, therefore, evasion is feared; but when the transaction takes place in public the suspicion of evasion disappears, and the remark of Felynus does

not apply. Then, too, I do not even find that opinion in Hostiensis and in Butrius in the passage on *c. I, De testibus*,[1] which Felynus cites. But in general it would not apply, nor would this assertion be made by Felynus in the case when it is lawful even to bribe a witness, for would anyone refuse to give evidence in the presence of a judge who can use compulsion, unless he is led to do so by a bribe? Menochius expresses himself to this effect: " But here there will be need of care on the part of the judge in making an examination, and in deciding, from the standing of the person concerned and the sum of money given, whether it is probable that it was given by way of pay for labor and expenses," and in this situation Menochius wishes to have it possible to give more, and he grants the judge discretion about what has been given, although he does not propose that he have discretion about what is to be given.

a—Fely. c. 1. de testi.; Covarr. reg. peccatum. p. 2. §. 3.
b—Bologn. cons. 27.; Butr. c. 10. de vi. et ho. cl.
c—Anch. c. 1. de test.
d—Purp. cons. 121.
e—Alex. l. 6. ad Treb.; Gail. 1. obs. 99. 151.
f—Fulg. l. 10. C. de testi.; Clar. §. falsum. n. 13.
g—Fran. c. 11. fi. de rescr. 6.
h—Bal. l. ult. fi. C. de fru. et li. exp.
i—Menoch. de arb. cas. 310.
k—Decia. cons. 189.; Decia. 1. cons. 2. n. 93.; Menoch. de arb. cas. 244.; Rip. l. 1. si cer. pet.
l—Arch. c. 66. 11. q. 3.
m—Bal. c. ult. de appell.
n—Panor. c. 1. de testi. rog.
o—Briss. 8. de form.
p—Menoch. 5. praesu. 8. n. 38.
q—Decia. 2. pr. 14.
r—Decia. 8. cons. 62. num. 12.

[*Decr.*, 9, 2, 21, 1.]

CHAPTER III

Of Instructed Witnesses

It is certain [a] that witnesses may be induced by entreaties to give testimony, provided there be no corruption. [b] In the same way, too, it is the instruction of witnesses with a view to corrupting them, not their instruction by way of warning, that is forbidden. Roffredus says in his pamphlets, on the title *De Senatus Consulto Liboniano*,[1] that a witness instructed by a party to speak the truth would not be called suborned. Over this dictum Baldus rejoices, as Felynus observes. [c] But Baldus, as Odofredus says, remarks that an advocate 138
ought not to give witnesses wrong instructions, but he easily is able in good faith to instruct them so that they may know how to speak the truth, and he adds that he has done this many times.

[d] He too, as well as others, makes the distinction that either the witness was instructed to make a positive or a negative statement, when it would be a case of subornation, or else, when the witness wished to make a positive or a negative statement, he was instructed to adopt a true and suitable form of narration, when it would not be a case of subornation. [e] A witness trained to express himself in suitable words is not said to be suborned, as Baldus also says elsewhere. Aretinus says too that witnesses in disagreement, brought forward by one and the same party, are not brought into agreement [in the trial], in order to prove a point, because the party bringing them forward has itself to blame, inasmuch as it has not instructed its witnesses beforehand concerning the truth, or has not known beforehand what they were going to say.

Here I would note that a witness, however, ought not to promise anything definite, for in that case he should be rejected according to another distinction made by Baldus on this point. [f] What, what kind, how much: those are definite points. To have made a statement in advance would not prejudice the case because that is not to have made a promise. However, it would not prejudice a case to have made a promise, if it is lawful to instruct witnesses, as the dictum allows. Such a promise is usually of no value, [g] since witnesses would "often" make a promise and not keep it; they would say one thing to a party concerned, another to the judge; it is to the party that they would lie "more frequently." [h] Still the party, too, which has

[1] [*Dig.*, 48, 10.]

trusted a witness and been deceived is excused and may take an exception to the testimony, but not at that stage to the persons whom it has approved by bringing them forward. [i] At least this is the common doctrine. [k] In this way we reject the judge whom we have obtained, and without taking an appeal because of the injustice of the judge regarded as a person, we do take an appeal from the injustice of his decision.

a—Host. Butr. Panor. Dec. c. 1. de testi.; Dec. cons. 188.; Panor. c. 3. de simo.

b—Fely. 9. de te. cog.; Aret. Dec. c. 1. de testi. et d. 188.; Aret. l. 2. si cer. pet.; Alc. 6. cons. 29.; Myns. 3. obs. 75.; Bal. l. ult. C. si ex fal. instr. l. 11. C. de his. qui ac. non po.

c—Bal. l. ult. de testi.

d—Bal. d. l. 11. n. 47. 48.; Mascar. de prob. 3. concl. 1207. n. 19.

e—Bal. c. 9. n. 20. de prob.

f—Decia. alii. l. 6. si cert. pet.

g—Bal. Saly. Castr. auth. at qui. de pro.; Soc. c. fraternitatis. de testi.

h—Hart. 2. obs. 16.; Menoch. de arb. 321. n. 19.

i—Menoch. cons. 248. 305. 343. 361. 396. 446. 495.; Ceph. 588.; Non. 24.

k—Spec. de app. §. 2. num. 23.

CHAPTER IV 139

Of Testimony Communicated in Advance to Litigants

That evidence is not invalidated when witnesses in advance have indicated to a party concerned what they were going to depose, [a] Salycetus maintains. In his judicial observations, the Palatine Chancellor admirably remarks that it is not wrong to ask witnesses what they know about a case, so that the party which is going to bring them forward may in this way consider what it can prove, because it would not be fraudulent for anyone to give thought to the preparation of proofs, and this response, he says, he made to a certain noble who inquired whether he could, without any prejudice, listen to certain persons concerning a case before he began the action. Thus the truth stands.

[b] Still I know that Albericus Rosatus teaches that the statement of those witnesses who repeat their evidence to the parties concerned seems to have no validity. [c] Also the glossator remarks that no credence is given to those who have disclosed their testimony to both parties, and again with the glossator stand Albericus and Fulgosius. Observe, says Fulgosius, that when the deposition of a witness is finished, his evidence, even when properly given, loses its credibility from what he has done afterward. The reason for this is [d] that in such a case it is taken for granted that he was under an agreement. Otherwise testimony properly given ought not to lose its validity. Now, someone will say, if the subsequent disclosure of testimony which has been given proves that there was an agreement about giving it, still more the disclosure and the communication in advance of testimony to be given will prove that it was given under an agreement, since the sequence from antecedent to subsequent events is more natural than the reverse process.

But notice this point first, that the law has been badly understood by the glossator, by Albericus, Fulgosius, [e] Baldus, Florianus, Speculator, and any others there may be—the law, I mean, from which they draw their conclusion with reference to this dis- 140
closure or announcement in advance. " Those who have given untrue or contradictory evidence, or have given evidence (*prodiderunt*) for each side are properly punished by judges." This is the law in which they wrongly think that *prodiderunt* means they have disclosed. *Prodere testimonium utrique parti* means to give testimony for each

side, [f] and so the Greeks say, " those who have given untrue or contradictory evidence in support of the two parties to a case are punished by the archons concerned." [g] In like manner the Latins use the expression, to give evidence and a verdict for someone (*dare alicui testimonium, sententiam*), etc. Undoubtedly that is a gloss of Cervottus, [h] who never wrote a single good gloss. In fact, incorrect glosses are commonly called Cervottine. I have in support of this gloss the name neither of Accursius nor of any other good old glossator. Accursius in that connection understands the law, as we do, to apply to him who contradicts himself and thereby lessens the credibility of his testimony. Indeed the laws which Accursius cites on that point show us his opinion. [i] These laws apply to one who vacillates so as to discredit his testimony, to one who gives contradictory testimony, not to one who discloses testimony to the parties concerned. In this way Franciscus, a learned man, and the highly esteemed son of Accursius, and the brother of Cervottus, interprets the point with regard to contradictory evidence; Accursius had styled it opposing (*adversa*) ; [k] Bartolus calls it conflicting (*diversa*), and he explains it as applicable to a witness who has made conflicting statements in support of the plaintiff and defendant, in support of the parties in conflict. I note too that Bartolus and Accursius interpret thus law 16, *De testibus*,[1] by law 27, *De lege Cornelia de falsis*,[2] and, conversely, the latter by the former. Now, in the one case we have *prodiderunt*, in the other *praebuerunt*. At this point I add that, if in the law *prodere testimonium* means to disclose testimony, it would have been to no purpose to add the expression about each party, since the same conclusion would have followed, even if the witness had
141 disclosed his testimony to one party only, and not to each party. Look at the reasoning of Fulgosius, which applies equally well to evidence disclosed to one party only. Ask yourself what other interpretation you can give it.

Meanwhile I add to the authority of Salycetus and Hartmannus the opinion held by everbody [l] that evidence would not be understood to have been ascertained as a result of such a disclosure, because not even a disclosure is understood to have been made, on account of its uncertainty. Therefore, I conclude with Salycetus that " much less " is the evidence understood to have been ascertained as a result of that advance announcement, with Baldus that one ought " much more " to say that the evidence has not been learned as a result of that advance announcement, since from such talks " no " certainty can be had. It is also true that in this case there may be a change of plan in the advance announcement. [I hold] the same view [m] as Hostiensis and others, that a man is not to be depended upon simply

[1] [*Dig.*, 22, 5, 16.] [2] [*Dig.*, 48, 10, 27, pr.]

on the strength of the fleeting word of his disclosure. Besides, a witness may have forgotten what he has said.

[n] I mention Baldus, too, who is more explicit. He writes that evidence which a party has been allowed by a notary to see does not lose its force. Consequently, much less would it lose its force owing to disclosures by a witness. [o] I am surprised that Decianus, in the case of evidence which has been read, says that much of its credibility is lost. He makes the statement, but offers no proof of it. [p] That the notary would be punished, as well as the witness, is quite true, as Decianus and others remark. But that is another question. [q] The notary who discloses the testimony of witnesses before it has been made public is held for betrayal of trust; thus, one was convicted at Padua on my advice and the advice of other doctors, says Jacobus de Belviso. He makes the same remark in the case of an advocate or an agent who discloses documents and other secret matters; in the case of a judge who discloses his verdict before announcing it.

[r] The testimony of witnesses is not invalidated, even if the parties have been present at the examination, although (and this too is another matter) the parties in this case would not be able to introduce new witnesses concerning the same points, or concerning directly 142
opposite points, because they have learned the testimony.

It is one question whether the word *prodiderunt* in the aforementioned law indicates a disclosure, as Cervottus and several others have claimed; and another, whether the credibility of the witnesses who make a disclosure is lessened, as no writers except Fulgosius and Albericus assert. The law mentioned above talks of punishing such witnesses, not of invalidating their evidence. Also, it is one question which arises in the case of witnesses revealing what they have said, and another question in the case of those who state in advance what they are going to say. The latter is the question before us, and in it we have no one arguing on the other side, so far as I know, while we have with us all those writers who on the former question hold that a disclosure does not prejudice evidence which has been given.

We have not only the clear statements of Hartmannus and Salycetus, [s] but also of Panormitanus and Felynus, who write clearly that the evidence of a person is not invalidated if he has stated in advance in the presence of a party concerned what he was to say in the trial. Indeed they maintain that it is a precaution to have him brought in to make a statement in advance, so that he may not have ground for changing his testimony. [t] This would be the noteworthy philosophical argument of Bartolus, [u] and with reference to this philosophical argument, we would observe here that, although it

seems to be rejected by several writers in so far as it concerns punishing a witness for perjury who changes his testimony, still the position is held to this extent by all writers that communicating the evidence in advance serves to safeguard it, not to destroy it.

a—Saly. auth. at qui. de prob.; Hart. 2. obs. 16.
b—Alb. d. auth. at qui. n. 7.
c—Gl. Alb. Fulg. l. 16. de test.
d—l. 14. C. de adult.
e—Bal. Flor. d. l. 16.; Spec. de teste. §. 4.
f—Basil. 21. tit. 1. §. 14.; Harmenop. 1. tit. 6. fi.
g—Cic. pro Flac.; l. 21. de testi.; l. ult. C. eo.; l. pe. de re. jud.
h—Caep. l. 124. de V. S.; Imo. l. 94. de sol.; Rom. l. 1. C. de ed.
i—l. 2. de testi.; l. 27. de fals.
k—Bar. d. l. 16. et d. l. 27.
l—Bar. Alb. Bal. Saly. Castr. d. auth. at. qui.; Host. Pan. Fely. c. 55. de testi.
m—Butr. c. 55. de testi.; Soc. d. c. fraternitatis.
n—Bal. c. 2. de testi.
o—Decia. 7. pr. 17.
p—Menoch. de arb. 537.
q—Iac. de Bel. inter Martianesii cons. 91.
r—Castr. l. minime. de legi.
s—Panor. c. 2. de cap. mon.; Fely. c. ult. d. testi. cog.
t—Bar. d. l. 27. de fals.
u—Ceph. cons. 428.; Menoch. de arb. 312.

CHAPTER V

Of Witnesses Who Are Criminals

Greek expounders think that [a] in criminal actions witnesses who are criminals are accepted: *ἐπὶ μαρτύρων ἐπὶ βίας† μαρτυρούντων ἢ* 143
ὕβρεως καὶ τῶν ἄλλων περιστατικῶν, ὡς ἐπὶ πᾶν οὐ ζητεῖται ὁ τρόπος τῶν μαρτύρων καὶ ὁ βίος, ὡς ὁ μάγιστρος ἔλεγεν, "in the case of witnesses who testify concerning assault or outrage, or on matters of that sort, generally the character of the witnesses and their life are not inquired into, as the Master was wont to say." The reason they have in mind is that it would not be easy in this case, as it is in the case of agreements, to bring in as witnesses men of an approved manner of life. [b] But there is no doubt, they think, that in criminal actions, which form an exception, witnesses of this sort are accepted. [c] Now, robbery is one of the exceptions and, of course, piracy, which is the worst kind of robbery.

[d] They are accepted in these cases which are difficult to prove, [e] and, forsooth, they are accepted so unreservedly that they are put beyond the reach of all exceptions even. [f] Now, those enterprises which are carried on secretly, as piratical undertakings of this sort are, are difficult to prove. Of this character are cases of deceit and pretense, and of these we are now treating. Clearly in these two classes of cases, criminals who otherwise are in general refused as witnesses furnish proof, as Jason says. He also names these cases and others which are difficult to prove. When I speak of him and of the others let no one urge against me the dictum of Butrius, that this is the situation when there can be no other witnesses either to the act or the disposition, [g] although this dictum would be disproved by reason, by usage, and by the teachings of Clarus. So also another obstacle is removed in this case, [h] based on the assertion that one must prove that a matter is difficult to prove, for it has been shown that piratical conspiracies and pretenses are difficult to prove.

[i] Furthermore, criminals are accepted in the case of those actions which are not done mainly in hatred of the injured party, as homicide is, but which are for the advantage of the offender, as theft is. This is the commonly accepted opinion, and is commonly followed. This view is clearly recognized in all sorts of robberies, [k] which are certainly committed to profit the robbers.

Criminals are even accepted in dealing with those acts which 144

as a rule are not wont to be carried out without the help of confederates. This likewise is the common opinion and the one observed in practice, and this opinion also applies to our case, which is a piratical case where confederates are concerned. Moreover, practice (Clarus too teaches this) applies this principle likewise in the case of all crimes, at least in the case of theft and robbery. This can be the fifth rule in the case of our witnesses, or rather the sixth.

[l] The seventh is that they would be accepted in civil actions, and now civil action is brought, since merely the restoration of property is aimed at. [m] Thus action can be taken, even though the crime would be a public one.

[n] The eighth point in our defense is that they are not accepted as entirely competent witnesses, and they are believed only when they say what is probable. But that probable testimony is given by these witnesses is evident from the fact that they are testifying against themselves, [o] and one cannot believe that a person deposes to his own disadvantage, unless it is the truth that he is telling. It is clear that the testimony is probable from the fact that the opposite would be very improbable: that a single Dutchman, a stranger, of humble birth, a poor man, acted as leader for all the rest, who were Englishmen, as master of the whole expedition.

The ninth reply is that in this case the question turns not so much on the evidence as on the confessions of criminals. It would indeed be a thing unheard of not to believe the confessions of guilty men of this sort. [p] Anybody can testify against himself. [q] In fact, we believe more the confession of a principal than we do a thousand witnesses who assert the opposite.

[r] The tenth reply is that witnesses are accepted as suitable if they are supported either by other suitable witnesses or by inferences, and here there are other inferences which have been mentioned above, inferences based on the incredible leadership and mastery held by a Dutchman, on the credible leadership and mastery held by Englishmen. The privateer was bought in England; here it was fitted
145 out also with everything; from here it also sailed out with all the English confederates. Would not a Dutch master have procured everything in Holland? The English, accustomed for a very long time during the last war to plundering expeditions of this sort, but now being forbidden them, still cannot desist, and have thought of these devices for covering up their deceit; they have chosen a person to call leader and master. But all this is a thin disguise, [s] and deceit is proved here by the unusual nature of the circumstances, even by easily made inferences. What is not "naturally wont" to take place should not be believed. Now, is this "a thing naturally

wont [to take place]," that a foreigner, and such a foreigner, should do such things for such Englishmen? This is enough.

a—Harm. 1. tit. 6. §. 10.
b—Arch. c. 5. 15. q. 3.; Decia. 3. pr. 19. et lib. 9. c. 29. n. 21.
c—gl. d. c. 5. 15. q. 3.; Decia. d. nu. 21.
d—Alex. 5. cons. 148.; Crav. 651.
e—Decia. cons. 342.
f—Ias. l. ult. C. de his qui. ut ind.; Dec. 2. cons. 37. 99.; Ceph. 652.; Menoch. de ar. 116.; Ro. Gen. decis. 184.; Viv. com. opin.
g—Clar. §. fi. q. 24.
h—Myns. 3. obs. 16.; Menoch. cons. 301.
i—Clar. §. fi. q. 21.
k—Bal. c. 55. de app.
l—Decia. 3. pr. 19.; Rui. 5. cons. 158.
m—Com. Imo. rub. de pu. jud.; Bar. l. ult. de va. et excu.; Menoch. de arb. 483. et cons. 557.; Schurpf. 3. cons. 32.; Anch. c. 1. depo.
n—Ceph. cons. 438.; Decia. 1. cons. 18.; Port. 2. concl. 23.
o—Decia. cons. 189.; Menoch. 23.; Port. 2. concl. 36.
p—Cau. 14. q. 2. prin.
q—Port. 2. concl. 34.
r—Alex. ad Bar. item Ias. l. 1. C. de su. tr.; Myns. 2. cons. 16.
s—Dec. 2. cons. 118. et lib. 3. cons. 32.; Castr. 2. cons. 109.

CHAPTER VI

Of Unsupported Witnesses and the Proof of a Storm

[a] To use the words of the most learned Decianus, I say briefly, coming directly to the point, that unsupported witnesses furnish a proof in those cases which are difficult to prove, and the lack of support is not a difficulty, but an element of strength, as when a single person furnishes proof of a confession made to him in one place, and another person furnishes proof of another confession made to him in another place. Those facts which can be established by several witnesses from occurrences which fit together are not established by unsupported witnesses; but the acts, which, because they are forbidden, everybody strives with all his ability and with various precautions and tricks to cover up, are proved by unsupported witnesses. These and other points in Decianus. [b] Indications, inferences, and presumptions are in this case considered true and conclusive proofs, and half complete and imperfect proofs are joined to form a complete and perfect proof. [c] Indeed, according to the
146 several kinds of business the law has introduced several methods of proof, and it has not wished to limit the range of proofs. [d] Others also, not mentioned by Decianus, teach that a confession is proved by unsupported witnesses; [e] that we believe evidence which tends to a single conclusion; [f] that we believe the evidence, if other inferences concur. There are other points, all of which count for us in this case.

So, even unsupported witnesses will prove in our behalf that the captain of the ship did not seriously try to put in at the island of St. Michael, beyond which putting in had been forbidden, while one witness says that there was definite conversation on the ship about a voyage straight to Holland. Furthermore, the other says that there was not a storm to keep them from the island. And the captain, how does he prove the existence of this storm? [g] There is no doubt that he who relies upon a negative has to prove the negative, and that he who alleges an obstacle has to prove its existence by acting and facing it. [h] The never failing rule is that he who depends on a negative should prove it. The rule also is that the proof of a negative should be reached by a careful examination. Therefore witnesses, even when not summoned, have to furnish a reason which is fully and necessarily conclusive.

[i] Besides, the man who is under obligation to prove the existence of an obstacle is also under obligation to prove that he has shown diligence, and that he has also made an effort, and that he has also striven with all his power to overcome the obstacle, and yet has not been able to overcome it and to carry the action through. Also proof should be given that he tried several times, and not on one day only, to weather the storm and make a landing. Further, there should be a public statement several times of the insuperable character of the obstacle, as all those rules apply expressly to chance occurrences. These rules it would be safer to follow than to follow the general distinctions.

But come, let this captain prove the obstacle, and we will not call for public announcements. Was he, [k] as all sailors regularly do, 147
governed by the wind, tacking in this way and that, until the storm passed by and a more favorable breeze came back? It has not been proved and no attempt has even been made to prove that it was necessary to come here, to England. Furthermore, [it has not been proved that] he could not have gone to some point in the Kingdom of Portugal. To this country, to this country his course certainly lay, since the end aimed at is learned from the route taken, [l] and the man who carries merchandise by unusual routes, and who carries it by other routes leading to forbidden places, is thought to be going to forbidden places. Would any storm bring him here from those islands and not allow him to go to the realms of Portugal? [m] A single storm does not rage everywhere, and the same storm coming upon a ship in a different part of the sea does not drive it to the same place. Indeed routes by sea and by land are of common knowledge. From those islands one goes directly through England to Holland, and, therefore, although the existence of some storm may have been proved, still this storm, of which they talk, has not been proved.

Let the navigator produce the formal papers which he has. At once the whole matter and the trickery in this case will be clear. [n] Publication should certainly be made to the fiscus or to an agent in behalf of the fiscus, even for the purpose of establishing the intention of the fiscus. [o] Navigators ought to produce such documents—that is the common opinion—especially if there be suspicion of any fraud, as there is suspicion here, from the aforementioned course of the ship, that the goods are being carried to another place than that to which the navigator says that they were destined.

The same suspicion arises when all the facts are concealed from the royal ambassador on his making an inquiry even about the duty due the King. "He is doing wrong who avoids the light." [p] It is also a "common" vice to withhold fraudulently tariffs and duties. This suspicion attaches also to the very owners of the merchandise,

that if the transaction should turn out as they wished, it would be well; but if not, they would for that reason suffer no loss, on the ground that the navigator was at fault. This from Comanus.

a—Dec. 3. cons. 66.
b—Paris. 2. cons. 29.; Menoch. 788.
c—Castr. 2. cons. 143.; Fely. c. 38. de testi.
d—Menoch. cons. 457. 906.
e—Non. cons. 23. 85.; Ceph. 142. 448.
f—Eug. cons. 63.; Menoch. 175.
g—Decia. cons. 172. 534. 649. et c. proposuisti. de prob.: Alex. 7. cons. 123.; Ceph. 47.; Odd. de rest. q. 18. n. 8.; Med. de cas. for. p. 1. q. 14.; Natt. cons. 199. 214.; Imo. 132.
h—Ias. l. 4 §. condemnatum. de re jud.
i—Fely. c. ex transmissa. de praes.; Pacia. 2. de prob. 47.; Menoch. de arb. 118. et cons. 518.; Contar. l. diffamari. c. 4. n. 117.; Zuccar. cons. 36.
k—Xenoph. 2. Cyrop.
l—Rip. de re. ad. cons. n. 79. et seqq.; Caep. l. si fugitivi. n. 68. C. de ser. fug.
m—Corn. 1. cons. 273.
n—l. 1. ubi Ias. de ed.; Rip. Cagnol. Alc. l. 1. 6. C. eod.; Ever. in lo. a fi. ad eccl.
o—Bal. l. 2. C. de con. ex le.; Alex. l. 1. C. de ed.; Dec. c. 1. n. 105. de prob.; Scot. re. 2. lib. 2. to. 2.; Menoch. de arb. 499.
p—Com. cons. 21.

CHAPTER VII 148

Of the Proof of Ignorance and Knowledge

The rule [a] is that we take for granted, not knowledge, but ignorance of another's act, especially if the person acting is a long way off. [b] Therefore, knowledge must be established by most cogent proofs, since the rule and presumption of law oppose taking it for granted. [c] Exact knowledge with all the characteristics peculiar to that act, full, definite knowledge must be proved. [d] Ignorance is proved from the very fact that the contrary is not proved, and thus there is a new method of establishing a point, as Andreas de Bamlo says. [e] But as an act of supererogation, the other party can prove his ignorance, and indeed by his own oath, and he must be listened to. This is undoubtedly the case.

Still the following principle too would be true that, [f] whether it be knowledge or ignorance, it must be alleged and proved by him who bases his purpose, either in suing or in taking an exception, upon knowledge or ignorance. Thus it is expressly against a third person opposing a *res iudicata* that it would be enough to bring this knowledge up against him, and that he would have to prove his ignorance. He would be a stupid person who should take an exception against this third party on the score of knowledge, for in that case he would himself have to prove the knowledge. This Villapandus, a very learned Spanish jurisconsult, says. Come, act generously; prove the knowledge. [g] It is a well-accepted principle that knowledge is proved by indications and inferences, by one witness even, and, therefore, in proving it, it is true that a very exact proof is required. Indeed, the matter is difficult to prove. Therefore, it would be proved just like any other matter difficult to prove. 149

Still, so far as concerns three or four of these people, it is quite certain that those who were always in the company of the navigator knew of the whole dispute with the navigator, although they said nothing. [h] It is taken for granted that those who are present know what is being done on the spot, especially what is being done publicly, especially what concerns themselves, and especially what lasts long enough to attract the attention, as is the case here. [i] It is taken for granted that a serious matter has become known to "everybody" whom it can "in any wise" injure. [k] Then also it is taken for granted that those who are absent are informed, owners by their agents, says

Maranta, as well as Menochius in his books on presumptions. [l] It is taken for granted that the owner knows what has been made known to the agent.

Now the captain of a ship is in a way an agent. [m] "He to whom the care of the whole ship has been intrusted is also an agent who administers another's business under the instructions of the owner." [n] That factors are kept on the spot—men who carry on the business—makes knowledge presumptive. Does not everybody know the industry of merchants and their very great watchfulness; how they have trusty scouts everywhere, who report to them day by day through the public letter carriers—through their own always in important matters—what new events are happening anywhere? [o] To prove the knowledge of one who is absent it is enough to show that a rumor has come to him from a report made by prudent and honest men. Knowledge is proved from the letters of friends, and such reports and such letters are regularly wont to be transmitted, as we all know from daily experience, and [p] from that which is regularly wont to be done knowledge is taken for granted. Knowledge is taken for granted from that which a person is in the habit of inquiring into,
150 and a person naturally, [q] a merchant especially in view of his occupation, is wont to inquire into that which brings him gain. [r] "A trained intelligence fighting for its profits," says the astronomer-poet, of the merchant. This natural presumption is considered "the most powerful of all," says Cravetta, and so he remarks that the allegation of ignorance is contrary to natural presumption, "so that trust in it cannot be made the basis of judgment for anyone." These opinions Cravetta expresses, and he is easily the leading jurisconsult of our age, [s] as Menochius says. Pray, let someone who lives according to the light of natural reason (to use the words of the same jurisconsult in a similar treatise) tell me whether we can believe that what was done was done by the navigator, while the owners of the merchandise did not know of it. There has been a suit, an appeal, a decision concerning the appeal, resistance to execution by every form of contumacy. Did not the navigator who did these things for the owners also inform them about all these matters?

Besides, how would these acts advantage the sailor? Nay, what disadvantage would they not cause the sailor if justice be done in that case? [t] In accordance with the well-known dictum of Cassius oft repeated in trials, a thing is believed to have been done by the person "for whose benefit" (*cui bono*) it would have been, and as it were under his instructions, the doctors say. [u] The act of a household, even when it is unlawful, is attributed to "the wish" of the master, because "it would not be believable" that anything should be done by the household contrary to the wish of the master. Also "instructions"

are taken for granted in the case of those acts which it is not probable that anyone would undertake to perform without instructions. There is no doubt in the case where the master both knows and can prevent the action. Therefore, it is taken for granted that these acts of the navigator are the acts of the owners, since they could have been of advantage to the owners. Therefore, also, it is taken for granted that they knew of these matters.

Or perchance could they not have been informed of what was going on here? In so many weeks, months even, has no letter gone from here to Holland? Has no letter come back to this 151 country from Holland? Yet regular public letter carriers have several times gone back and forth in this whole period. [x] There are "sufficient" grounds to infer knowledge from the fact that the places are near each other. Holland, where these owners are said to have been, is distant by an easy voyage of one or two days, [y] if we believe, as the law holds, that on a voyage fifty miles is the usual distance for a single day. [z] Places are near at hand which are not far away. [aa] What is not distant more than two days by sea is called nearby. So the judge would say at any rate, [bb] to whose decision the question of settling the matter of proximity would be assigned, [cc] if the decision is to be given in accordance with the rules of common law, and to be in harmony with approved principles. Here notice in addition the long period of time, as I have said.

[dd] Besides, we assume that those who have known a part have known the rest also, as others, including Menochius in his responses, remark. They have heard nothing about the suit? "Let the Jew Apella believe it." [1] But if some have known, we assume that the rest know too, [ee] since the argument is valid in passing from things to persons. [ff] Cravetta, in talking of the knowledge of a third person who wishes to delay the execution of a sentence brought likewise against a second party, shows that a partner is presumed to know the acts of a partner, and undoubtedly subsequent results, and lawsuits particularly. He shows too that, even if there is no partnership, it is taken for granted that the third party knows of the trial of a noteworthy matter in controversy. He shows that even a long lapse of time would not lead to ignorance of a thing of this sort. Therefore, I would say also that it is taken for granted that a partner in the merchandise in a given vessel would know acts like these on the part of a partner. There is partnership in this case—this is evident from the treatment of jettison, as well as from the proverb, "to be carried in the same ship," and from similar reasoning, and from other arguments.

[gg] Besides, remoteness, if there were any remoteness of place 152

[1] [Horace, *Sermones*, I, 5, 100.]

in this case, would not lead to ignorance of this sort of a noteworthy matter in controversy, [hh] as the argument is valid in passing from time to place. In the same passage also Cravetta says that those manifest and widely known events which happen in court seem near at hand. [ii] This statement others also make. [kk] To have known of the legal action taken by a man with whom one has a compact is inevitable, and they have a compact with the navigator.

In this way, moreover, a definite determination is proved in the case of some of them, and by several presumptions is proved for the rest. [ll] The knowledge which comes from several presumptions is also called sure and complete, [mm] and here there is no place indeed for those common teachings, so say Romanus and others, that ignorance of another's action is taken for granted, and is established by an oath, etc. As the common doctrine goes, those principles do not hold, when knowledge is assumed from inferences. Indeed, it would be the duty of the judge to administer the oath, and yet he will not administer it to a man against whom there is a presumption, "if any" presumption of law stands in the way of asserting ignorance of the allegation, [nn] as Menochius remarks in following other writers. Natta puts it well that without doubt proof of this sort by means of an oath would be privileged, and contrary to the common law. Therefore, it ought not at all to obstruct the truth. That oath would be admitted in the case of likely ignorance, he remarks, [oo] in the case of probable ignorance, others say, and this probable ignorance, Oddus, my teacher, also says, does not harmonize with presumed knowledge.

[pp] From the character of the person, as Natta and Navarrus in common say, the judge in this case will settle the matter from the circumstances of the business, on considering if the person was in a place so remote, that knowledge of the act could not easily come to him. But let us consider here the facts which have been set forth above: a matter of importance, a place near at hand, a person with the industry of a merchant, the frequent journeying of letter carriers, an abundance of friends to give information, etc. Further an oath
153 is not administered when the question arises concerning the prejudice, not slight, of a party concerned, as Menochius says in his decisions, and as we read in other writers. Here the question arises, not concerning a slight prejudice, but with reference to the delay, caused by these people, in executing a sentence pronounced against the navigator. [qq] To delay the execution of a sentence is a matter of no small prejudice.

a—Menoch. 6. prae. 23. n. 51. et cons. 120. 246.; Purp. 548.
b—Ceph. cons. 720.; Turrest. 2. cons. 8.
c—Tiraq. de retr. lig. §. 36. gl. 2.; Turr. 2. cons. 42.; Menoch. dd. 120. 246.

d—Baml. l. pe. C. qui mil. poss.

e—Ceph. d. 720.; Menoch. d. 120. et 186.

f—Villap. rep. l. 22. ti. 1. parti. 7. p. 2. num. 8.; Ceph. cons. 314. n. 31.; Med. de cas. for. p. 1. q. 3. n. 6.

g—Decia. cons. 583. 613.; Ceph. 314.; Menoch. 37. 87. 615. 617.; Decia. 1. cons. 24. et lib. 4. cons. 4. 69.; Turr. 3. cons. 17.; Burs. 2. cons. 143. 174.; Grat. 2. cons. 65.; Gabr. 2. cons. 149.; Purp. 1. cons. 172.; Ro. Gen. dec. 172.; Anch. Reg. 1. q. 63.; Cost. de fa. sc. et ign. insp. 64.; Bal. c. 1. de post. prael.

h—Imo. l. 18. n. 3.; Mara. 309. de ad. he.; Menoch. 6. praes. 21. 23.; Ro. cons. 481.; Crav. 271.; Burs. d. 143.; Decia. d. 69.; Odd. de rest. q. 8. n. 68.; Bal. l. 5. C. de pe. tut.

i—Menoch. cons. 421. num. 69.; Crav. 330. num. 8.

k—Mara. d. l. 18. num. 293.

l—Paris. ad Bar. l. ult. C. de per. tut.

m—l. 1. de exerc.; l. 1. de procur.

n—Decia. 4. cons. 4.

o—Bal. c. 2. n. 8. de constit.; Aret. §. duo fratres. num. 27.

p—Decia. d. 4.; Crav. d. 271. 650. 809.; Purp. d. 172.; Io. Ant. a S. Georg. c. ult. num. 4. de conjug. serv.

q—Cagnol de prin. n. 64.; Decia. 3. cons. 62.; Strac. de merc. p. 2. num. 16.

r—Manil. 4.

s—Menoch. prael. recup. n. 2.

t—Briss. ult. de form.; Costa de fa. sc. et ign. insp. 34.

u—Rui. 1. cons. 59.; Crav. 350. et de ant. p. 2. n. 36.

x—Covar. pr. q. 13. col. 15. fi.; Paris. d. l. ult.; Crav. d. 271.

y—Bar. de insu. ver. Nullius.

z—Fely. c. 7. de praes.

aa—Castr. alii. l. 9. de judi.

bb—Menoch. de arb. 222.

cc—Paris. 3. cons. 151.; Mand. ad Ro. 376.

dd—Aret. d. §. et n. 27.; Odd. d. q. 8. n. 70.; Menoch. cons. 73.; Crav. 553. 572.

ee—Decia. 1. cons. 11.

ff—Crav. cons. 997. num. 9.

gg—Decia. 3. cons. 62.

hh—Dec. 1. cons. 18. et lib. 2. cons. 11.

ii—Dec. 1. cons. 10.

kk—Menoc. cons. 319.

ll—Menoch. cons. 617.; Crav. 350.

mm—Rom. cons. 48.; Ceph. 314.; Crav. 271.; Alex. 2. cons. 118.; Burs. 2. cons. 174.; Menoch. 617.; Anch. Re. d. 63.; Fely. d. 7.; Odd. de rest. q. 38.; Flor. l. verius. de prob.

nn—Menoch. de arb. 186.; Natt. cons. 230.

oo—Fely. c. 2. de const.; Crot. §. duo fratres.; Odd. de rest. q. 8.

pp—Navar. cons. 1. de constit.

qq—Panor. c. veniens. n. 9. de testi.

CHAPTER VIII

That a Third Party Suspected of Bringing an Action in Bad Faith Is Not Allowed to Delay the Execution of a Sentence Pronounced against Another

Those who [a] knew or are presumed to have known of an action in which a second party is concerned and of the sentence pronounced against him, and have kept silence, seem to bring an action in bad faith in opposing afterwards the execution of that sentence, and ought therefore in no wise to be listened to. In this way the evil intent is proved on the part of those who, for the sake of tiring the litigant out, come forward so late to ward off a judgment which they believe will fall upon them. [b] Bad faith "is shown to be evident" in the case of one who takes various appeals at various times, just as it is with one who brings several actions for one sort of offense (see Jason on *Code, De transactionibus* [1]); "malice," in the case of one who for the first time in these circumstances interposes an appeal never before made, especially when it is essential and fundamental, especially in the case of one who possesses property. He has other points of this sort. All these considerations count in this case where the Dutchmen at one time carried on all their legal actions through the navigator, and now wish to act for themselves. [c] A person who keeps silence about his real right seems to do so with evil intent, as others also teach. Cravetta says that evil intent is taken for granted, if slowness in coming forward to delay an execution is shown on the part of the third person who, knowing about a trial at its very beginning, has
154 postponed opposing it until the case has been settled, in order that he might in this way inconvenience the victor, so that, when nothing is left him except to see to the execution, then of all times the business might go back to the very beginning, although the suit was just over. He says that it is very probable that the new action was postponed because the third party thought that the law was not on his side; [d] also that suspicion of bad faith arises from the fact that the third party comes in when the situation is desperate.

And would not the situation be desperate for these adversaries of ours? They have had this one anxiety, to conceal themselves, to have it said that everybody else owned and possessed the merchandise. But, since the navigator has been defeated in that suit, these

[1] [*Code*, 2, 4.]

people have no chance now except by fighting in their own names, desperate as their course is, at least to delay the execution of the sentence pronounced in favor of the Spanish Ambassador. What further may they hope for, since they have been defeated in that case where they had especially put their hope? [e] Besides, Cravetta also says that fraud is inferred from an unusual procedure, and I say that it is an unusual, an unheard of thing that a navigator should be a party to an action covering merchandise of such value, when the owners are near at hand, present, acquainted with the facts, but saying nothing, and lying in concealment. The same doctor mentions more points, too, of this sort, by which he lays bare the bad faith of the third party against whom he is arguing. By these same points we lay bare the bad faith of our adversaries. He adds too that a single inference, " a single suspicion suffices to lay bare bad faith," and therefore it would not be difficult to decide what one should say in the case of many and more serious suspicions.

All of these points, indited as it were against these opponents of ours, we also urge. [f] Intent to deceive cannot be readily determined, except from inferences, etc. [g] Cravetta says that collusion of the third party in such a case with the litigant has been " very clearly " revealed. But there is no reason why we should not say the same thing of the collusion between our third parties and the navigator. [h] I add that less serious suspicions ought to count here in establishing bad faith, since the case is summary, involves an execution, allows 155
the introduction of a simpler counter argument, and concerns possession, as Contardus says, who also therefore adds that it may properly be inferred that a slighter presumption of bad faith would suffice. [i] I also say that instances of bad faith most readily arise and are frequent in these cases of opposition, and they often originate in evil intent, deceit, malice, wrongdoing,—more frequently than in justice, to quote the words of Covarruvias.

[k] From this fact the conclusion also which is very frequently taught is very properly drawn, that a third party taking an appeal ought in his appeal to set forth an express reason, even if otherwise a reason would not have to be given in an appeal from a definitive verdict, for when an appeal is taken contrary to the rule of the law, " on account of the presumption of evil intent " it should not be admitted unless it be justified by an express reason. [l] That which is " easily " dissociated from a thing, says Baldus, does not prove the existence of that thing. Therefore, say I, that which " most easily," " frequently," " nay generally " is associated with a thing would prove the existence of that thing, [m] since the argument from that which frequently happens is strongest in the case of presumption and proofs, being especially powerful, valid, and efficacious there, etc. [n] But where

there is presumption of bad faith, the third party will not hinder the execution, as the common opinion goes, even if proof be offered at once, as Felynus teaches, in following others. [o] In support of the same conclusion I add Alexander, Jason, Cravetta; and in the latter's writings another authority is named to the same effect. Nor does Decius in his responses take the side of Panormitanus, who teaches the contrary doctrine in the supplement added to his treatise. [p] Decius, in view of the reasons advanced for hesitating and for not settling the matter, holds to the earlier opinion of Panormitanus which supports
156 the other side. He does not, however, reply on the decisive point, since, without refuting Panormitanus, he had another sure reply to make, because in his case proof could not have been given at once. [q] In his lectures Decius stands vigorously for Panormitanus, and yet he urges no argument in support of Panormitanus.

He does not even reply to the first, most convincing argument of Alexander, the only argument which Felynus sets down, and which Jason asserts is a good one. It is this: When proof is required at once, the offering of it accomplishes nothing further; but proof is required at once to delay an execution; therefore, the offering of it will not also eliminate the presumption of bad faith. I am surprised that Covarruvias, who also inclines to the view of Panormitanus, says that Decius has replied to Alexander. Decius replies, or tries to reply, to the other reasons of Alexander, but to the reason given above he does not even breathe a word.

The reason given above is also confirmed in this case of possession of ours, [r] in which, as involving an execution, proofs offered at once are especially required to delay the execution. [s] To delay an execution proof is required at once, but in particular to delay an execution in a case of possession. Now, two arguments, like chains, hold them fast. Will the offering of proof even yet remove these two and remove besides the presumption of bad faith?

The point which Decius urges about another argument of Alexander which he turns against its author is also groundless, for it does not follow, if the case of the robber would be a special one, because the hatred felt for him prevents us from listening even to what he wishes to prove at once —it does not follow that the procedure would be the reverse in the case of one acting in bad faith. Indeed, Alexander says properly that if this is true of the robber it ought to be true also of one who acts in bad faith, for each of them is thoroughly detested. Still I do not set about examining this point more thor-
157 oughly. It is enough that Decius brings nothing in support of the opinion of Panormitanus, and nothing against the very strong argument of Alexander. I am surprised that Covarruvias also cites Innocent [t] in support of Panormitanus, and yet that in his entire dis-

cussion, running through four long chapters, he has not advised us of one point especially to be noticed.

Indeed, not only Innocent, but also Hostiensis and Ancharanus and others teach, and in fact without hesitation, that presumption of bad faith, which hinders the admission of an exception, will not hinder it if the proof on which an exception is based be offered at once, and that this proof in such a case should be admitted, or an appeal will be taken from the failure to admit it. [u] Offering proof at once eliminates "all" presumption of malicious action, as the common view runs. [x] What is offered at once leads to a departure from the rules of law, as many other writers teach at great length. But it is necessary to notice that [y] these people are plaintiffs who come to hinder the execution of a sentence pronounced in a suit between others. Therefore it would not follow at all that an action also for delaying execution should be admitted, simply because an exception is admitted for delaying execution, although an action which does not delay execution is admitted more readily than an exception which delays an execution or a sentence. But Innocent and the others are talking of an exception which would not necessarily have to be approved at once; of an exception in the case of an agreement, I say, not to make a claim, or in a case of money not paid out. It is not the practice to bring such exceptions to oppose an execution. Besides, they speak now and then of a *quasi* execution, not of an execution in the strict sense of the term. The title upon which they are speaking, the laws cited by them, show this. Thus they add nothing in support of Panormitanus on the present point. In fact, Covarruvias himself takes a 158
firm stand on the side of Panormitanus only in case immediate and full proof be offered in these circumstances. Just as Felynus also writes that perchance the dictum of Panormitanus would hold "on account of his authority," if the proof offered were also full. Here I observe that Felynus still hesitates and makes this concession only to the authority of the man. Still, after putting before us this view of Felynus and Covarruvias, we reply that in this case it would not apply, because a full proof cannot be given at once. [z] Furthermore, an execution, and this doctrine other writers teach, is not obstructed, if the proofs are not ready and complete, but require more careful investigation. In this case there cannot be a full and immediate proof of ownership and possession on the part of this third adversary of ours, [aa] for in examinations involving an execution the procedure is summary, and therefore exceptions calling for a somewhat more careful inquiry are not admitted.

What will the offering of immediate proof accomplish, if an immediate proof cannot be given? [bb] When there is a presumption that immediate proofs are offered in bad faith and with evil intent,

then the judge ought to reject them. This point Menochius has lately made clear. This is also quite right, [cc] if we are not to foster malice, if we are not to listen to petitions made in bad faith, if we are not to listen to those acting in bad faith, but rather to repel them from the threshold, and give no heed to their appeal. [dd] In fact, just as the right of defense ought not to be denied to those who have been injured, so the way ought not to be opened to bad faith. [ee] An appeal is not reasonable in the case of one who could foresee a situation and make clear his right, for the presumption is that in such circumstances he would be appealing for the sake of causing delay. [ff] Slowness, procrastination excite suspicion. Would not these mer-
159 chants have rushed here, if they could have proved or claimed any right of theirs?

a—Crav. cons. 997.; Menoch. 478. item. 2. praesu. 91. et lib. 5. c. 3 n. 105. et c. 26. n. 12.
b—Castr. 1. cons. 181.; Crav. 350.; Anch. 234.
c—Paris. 4. cons. 76.
d—Crav. d. 997. n. 13.
e—Crav. d. 997. n. 14.
f—Oldr. cons. 324. n. 9.; Corn. 1. cons. 273.
g—Crav. d. 997. num. 30.
h—Cont. si de mo. po. lim. 7. n. 49. 50.
i—Covar. 13. pr. n. 1. et c. 14. ad fi.
k—Covar. pr. 15. prin.
l—Bal. c. ult. de coha. cl.
m—Ias. l. 4. n. 15. C. un. leg.; Str. de merc. p. 2. n. 29.; Decia. 3. cons. 76. 123.; Crav. 271.; Menoch. 6. pr. 14.; Corn. 2. cons. 80. et 194. 213.; Cuja. rub. de praesump.
n—Covar. pr. 16. n. 2.; Fely. c. veniens. il. 2. n. 10. de test.; Conta. 15. de mo. po. lim. 7. n. 41. et seqq.
o—Alex. 4. cons. 94.; Ias. l. 9. de jurej.; Crav. d. 997. n. 18.
p—Decia. cons. 424.
q—Dec. c. ex parte. il. 2. n. 49. de off. de.
r—Menoch. 4. adip. 912.; Ias. l. 2. n. 1. l. ult. n. 24. C. de ed. di. Ha. to.; Rol. 1. cons. 1.
s—Panor. 2. cons. 5. num. 1.
t—Inn. Host. Anch. c. post electionem de conc. praeb.; Conta. si de mo. po. lim. 7. n. 46.
u—Ferrett. cons. 367.
x—Ruger. 2. cons. 13.; Menoch. 3. rei. 673.
y—Ceph. cons. 768.; Decia. 3. cons. 118.
z—Cioff. 2. cons. 20.; Cach. decis. Pedem. 26.
aa—Alex. d. 49.
bb—Menoch. 2. praesu. 47.
cc—Spec. de pri. der. §. 2.; Ang. l. 46. de pe. her.; Pan. c. 15. c. 28. §. quia vero. n. 3. de off. deleg. et add. d. c. veniens.
dd—Barul. l. facultas. C. de in. fi.
ee—Hond. cons. 17.
ff—Decia. 5. cons. 69.

CHAPTER IX

Of Immediate Proof

There are [a] some who say that to offer proof at once and to seek a short delay are the same thing. [b] Yet, on the other hand, others say that he who is under obligation to prove a point at once must offer to prove it in exactly this manner. To offer, I say, to give the proof within the limit of time which the judge may have assigned would not be enough; within the lawful time would not be enough, for all delays ought to be lawful. [c] It is clear that when one has instruments in his hands, and shows them without any delay, he, as we say, furnishes a proof at once. [d] We say that what is shown in books opened before one does not require a somewhat careful investigation. Therefore, this process would be furnishing proof at once, since we see that a somewhat careful inquiry and this kind of proof are by all writers placed in contrast. [e] To give the proof at once means to be ready within three days, even within ten days—even within two months, provided the proofs are ready, but not in the place of trial. [f] Or at once would mean within the time within which a summary action, in which this proof would be presented, might be finished; within the time within which the case at issue might be finished. This is the common view, for the reason too, that thus should be interpreted the saying that it is in the discretion of the judge to decide what immediate proof is, so that the judge [g] ought to limit his discretion in accordance with that which the law intends and means. But the law would make it clear that what can 160
come within the time just mentioned can be proved at once. This common view will be properly approved, because in individual cases —[h] numerous and varied as they are—involving immediate proof, [i] likewise in those cases where a somewhat careful investigation is required, the matter is more commonly settled under the power which the judge has to exercise his discretion. Then by all authorities the principle is recognized that the discretion of the judge ought to be governed by the law.

However, varying additions are made to the individual cases from the law of those times—as one may see in Menochius—and yet in keeping with this general formula. [k] But this fact should be the more observed that it is not immediate if witnesses have to be called from beyond the mountains, says Innocent; from beyond the sea,

says Hostiensis; witnesses from a long distance, and those who are not near the court, says [l] Oldradus, and with these writers the other doctors agree. Here, too, the judge would have no discretion in waiting for witnesses and proofs from a long distance, however thoroughly prepared they might be. [m] A proof is not immediate where a person has to set forth the right of one who gives and the nature of the thing given; when something has to be proved in the domain of law, or something in the realm of fact; when something has to be gathered by the interpretation of words. [n] Minuteness in the way of fact or of law requires a somewhat careful investigation. [A proof is not immediate] when the question of law or of fact involved is not easy; when arguments do not agree; when the doctors do not. [o] The documents themselves which are said to constitute an approved proof, if they call for some proof from outside, are not said to furnish a proof at once, provided one has to debate the documents, provided it is necessary to examine the witnesses. There are other points which the doctors usually teach.

All these points count against the Dutch, who offer questionable witnesses and documents, and through these witnesses and documents
161 they submit what they consider immediate proof. A proof is not immediate when one must debate it; in this case the Dutch will have a very protracted debate. They wish to prove that the goods were bought for them in Brazil, were transported to them, were turned over to them. And here they submit letters from Brazil, witnesses, documents, and marks. But we shall have to investigate everything, and examine the witnesses, and look into the validity of everything. And can everything be done at once? Absurd! Or they will say that it can, for the reason that it would be enough if everything would apparently be done. [p] Indeed, they teach and assert that we must observe with great care that a third party, when he is to show that his interest is involved in staying an execution, satisfies the situation in doing it in some circumstances (when there is no damage or slight damage involved) by taking an oath; he satisfies the situation in other cases by offering proof not very exact, and not necessarily very conclusive, but only of a *prima facie* sort; that in a summary inquiry like this one the rejection either of witnesses or of evidence would not be allowed.

[q] Still to these points I make the reply that in ecclesiastical matters they hold and are taught; that they do not hold in secular and civil cases; [r] that besides the doctrine is, I say, that this *prima facie* evidence ought to be half complete; nay, even complete, according to some writers. In this case, at least, complete proof is required of the Dutch, since there is a serious presumption of their bad faith. Here a necessarily conclusive proof is required, since the question in dispute

is whether they are a third party and not identical with the litigant, whose case is irreparably prejudiced, and, therefore, as Felynus asserts, further proof, of a *prima facie* kind, is not enough. [s] In giving persons a legal standing full proof is needed, even if the principal case be summary, as the common view runs. [t] This view is defended by Decius against Jason. Decius also says that in case litigants be admitted even with a proof not half complete, that would only go to the point
of letting them be heard, not of delaying execution, which these Dutch 162
of ours are trying to accomplish.

a—Ferr. cons. 367.
b—Natt. cons. 153.
c—Rol. 3. cons. 98.; Dec. 467.; Bero. c. 1. n. 38. de rest. spol.
d—Zuccar. cons. 3. n. 126.
e—Cacher. decis. 26.; Ant. de Patrutia in l. nam et postea. §. si minor. num. 442. de jurej.
f—Cacher. eod.; Rol. d. 98.
g—Menoch. de arb. q. 13.. 14.
h—Menoc. de arb. cas. 7. 9. 10. 12. 14. 16. 17. 18. 19.
i—Crav. cons. 901. num. 9.
k—Inn. c. veniens. prin.; Host. n. 1.; Pan. 11.; Arct. n. 24. et 26.; Fely. 15. de test.; Rol. d. 98.; Ruger. 2. cons. 13.
l—Oldr. cons. 323. num. 3.
m—Rol. d. 98.; Dec. 424. 467.
n—Crav. cons. 901. num. 9.
o—Contar. si de mo. po. lim. 12.
p—Fely. d. c. veniens. num. 13.
q—Rol. 1. cons. 1. n. 80.
r—Scot. resp. 18. lib. 6. 10. 1.
s—Decia. l. ult. n. 16. 19. 46. 47. C. de ed. div. Adr. toll.

CHAPTER X

Of Marks, the Letters of Merchants, and Other Documents from the Collectors of Revenue; and of Proof of Ownership and Possession

Brands, [a] they call them marks (*marchae*), stamped on bundles and on chests of merchandise do not furnish full proof of the ownership of the merchandise; they furnish a presumptive and unreliable proof, as Straccha well puts it, and on this point Menochius and the others teach the same doctrine. But even before Straccha others have taught this, so that undoubtedly this is the common view. [b] "The letters of merchants in accordance with usage are said to have the force of public records, and are accepted by everybody." [c] This is true, too, of the documents from the collectors of revenue, [d] but these letters, to be used as proof, must be acknowledged. However, it is an accepted principle that letters not acknowledged are certified by a comparison [sc. with other letters where the writer is known], and the same practice would hold for account-books. [e] In the case of receipts the principle would not be the same, unless the said receipt, which has not been acknowledged, has the signature of three witnesses; with another receipt it is not possible to secure a comparison. And the reason for the difference is that the party interested in the case of a receipt ought to take the consequences upon himself if the business was not carried out in due form. On these points Straccha holds the same opinion, and concerning the comparison of the letters he also mentions something else to the same effect, which I do not set down. [f] Other writers too remark in the same way on the difficulty of proving a private document, even a document between merchants. All these points I note against the Dutch in this case, who wish to offer a full and immediate proof of their ownership and of their possession by those processes which are unre-
163 liable and call for a somewhat careful investigation. Here I cried out in a manner not mine, but that of pettifoggers.

[g] It is more difficult to acquire possession than ownership, and [h] ownership, even of personal property, as Purpuratus says, is very difficult to prove, and, [i] as Purpuratus and others remark, almost impossible. [k] Various things are needed for the proof, namely, of ownership. [l] That the transfer has taken place must especially be established, even to the extent of a transfer of possession, [m] and al-

though we hear that kings have long arms, we do not hear that merchants, who, living in Holland, take, so they say, things offered in the Indies, have long ones. Or if their agents are there, to whom the property has been handed over, has a special mandate also—[n] for this must be shown—been given to the agents to acquire possession? Servitors, as Purpuratus says, cannot acquire possession without a special mandate. [o] Possession can be had by anybody, and ownership can be acquired even by those who are unaware of their acquisition, I admit. [p] But still ratification is then necessary, and this ought to take place before anything else is done, and before a change is made in the right of possession. But here we have such a change made by the decree of the court, by which possession has been made over to the Spanish ambassador. [q] From a mandate authorizing the transfer of property to me I do not acquire possession, but I acquire it from the transfer itself, for it is one thing to make a transfer, another to order a transfer. Even when I have ordered you to send a thing to me, and you send it, I have not acquired possession, although you may be freed from the action of the contract. [r] The navigator would "only" have the power (observe the argument against the Dutch, who in this manner have received from the navigator) of giving to those persons to whom the navigator was ordered to give, but they would have no real right in consequence of that order.

Merchandise is carried under their instructions. Then is the possession and ownership theirs? Experience says, "No." Even if the money has come from them, still the possession or ownership 164
would not yet be theirs. This and other points are to be found in Purpuratus, the great jurist—[s] a title which Menochius uses in praising him. In the same writer one reads that no acquisition is made by an owner, unless there be an action in person against the agent. [t] In the same writer is the statement that the possession of Titius would not be proved, even if it were recorded in the accounts and in other documents that the merchandise belonged to Titius. [u] Even the words of the documents, "*tradidit*," etc., do not prove the actual transfer, and therefore do not prove the real acquisition of ownership or of possession. Only liberty to take seems to be given, and there is only an action for damages therefrom. [x] Documents do not prove either ownership or possession. [y] Even by virtue of an engagement made by a notary an absent person does not acquire ownership. [z] Those who are absent, as these adversaries of ours were, do not acquire ownership without giving their mandate through another person, who says that he has bought in their behalf. But the purchaser acquires it, if it is acquired, that is to say, if the other necessary conditions for securing ownership are present. [aa] Those who are absent do not acquire possession by an engagement

made by a notary or by an agreement. Now, in this way I shall reply to other arguments also, if they are brought forward—the present arguments I am bringing up against myself on my own account—to prove ownership, to prove possession.

These matters I note in order that it may be clear that these adversaries of ours are evidently bringing a false charge in daring to offer a full and immediate proof of ownership and possession. And they will not be helped by the common saying that things which do not profit one, when taken singly, help, when they are many in number, for if the points are many it is the rather probable that all of them cannot be brought in at once. [bb] In this matter of proving ownership, and to the aforementioned argument and to others, and to this common saying Menochius replies that in a case involving much money, like this one of ours, several presumptions are not combined to make
165 a complete proof; that in the case of presumptions or proofs which taken individually do not tend to establish ownership, and the proofs in our case do not tend to this effect, as he also shows, it is not true that they may be combined to establish ownership. He also says that this connection is never established when full and true proofs are required, as full proofs are required in establishing ownership. [cc] In spite of the fact that Menochius elsewhere and others teach that ownership is difficult to prove, and that therefore in proving it inferences and indications are accepted, this statement is not to be applied to any inferences whatsoever, but to inferences which establish a proof that is sure and approved by the law, and they teach that it is to be applied only in certain cases, such as those which run back into the past. [dd] So Decianus also distinguishes in this connection between new and old matters. [ee] In addition I mention Cravetta and Contardus, who teach that the proof of any ownership is easy. [ff] I mention also Corneus who says that ownership is not so difficult to prove, that proofs lacking in completeness should be accepted. There are more points to this effect, which have been set down in writing, even in the very cases where merchants are concerned, and in these cases they are said to hold. [gg] If proofs in these cases are not dispensed with, proofs concerning the merits of the case and concerning the deciding points are not dispensed with, [hh] and it is clear that there are proofs concerning deciding points. Now, I do not inquire further. I know that not very many of the points which have been brought forward by us in their behalf should be urged against us by our adversaries. [ii] I deny that they have acquired the ownership of the goods, even if bought with their own money, even if bought under their instructions by their agent, unless also in accordance with their instructions the goods have been handed over to the agent, or unless he has handed them over to the mer-

chants. I deny that ownership on their part can be proved at once and in full. This is justice; this we ask for.

a—Chass. 1. catal. 38. concl. 35.; Strac. de merc. p. 2. n. 78.; Ro. Ge. decis. 201.; Menoch. cons. 566. et 3. prae. 64.; Purp. cons. 202.
b—Ro. Gen. decis. 142.
c—Ro. Gen. decis. 122.; Mantu. 2. dial. 10. c. 19.
d—Strac. quo. in ca. me. pro. sit. n. 13.
e—Strac. eod. n. 10. 11.
f—Alex. 4. cons. 8.
g—Purp. cons. 71.
h—Medic. de adq. pos. p. 1. gl. 2. n. 26.
i—Purp. cons. 191.
k—l. traditionib. C. de pact. ubi not. Hoto. ill. q. 11. 12.
l—Alc. l. 3. n. 11. de bo. po.
m—Host. c. 15. de ele.; Pereg. cons. 75. num. 4.
n—Purp. 1. cons. 43.
o—Soc. ju. l. 1. n. 193. de adq. pos.; Ferr. 1. cons. 184. 220.
p—Zuccar. cons. 24.
q—Purp. d. 202.
r—Purp. d. 71.
s—Menoch. cons. 609.
t—Purp. d. 202.
u—Menoch. cons. 663.; Crav. 157.
x—Cy. l. 2. C. de ad. po.; Alb. l. 12. C. de prob.; Ang. l. 9. C. de rei vin.; Zuccar. cons. 37.; Purp. 191.
y—Menoch. cons. 733. num. 21.
z—Paris. 1. cons. 47. num. 66.
aa—Decia. cons. 226.; Purp. 79.
bb—Menoch. cons. 576. num. 24
cc—Menoch. d. 576. n. 11. et 361. n. 15.; Pa. 1. cons. 104. n. 42.
dd—Decia. 3. cons. 87.
ee—Crav. cons. 269.; Con. de mo. pos. op. 1.
ff—Corn. 4. cons. 24.
gg—Purp. d. 202.
hh—Zuccar. cons. 38.
ii—Menoch. 3. praes. 51. n. 42.; l. 13. l. 59. de adq. rer. dom.

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CHAPTER XI

When a res iudicata *between Certain People May Injure Others, Following l.* saepe, Dig., De re judicata [1]

The general [a] rule is that "transactions between certain people do not injure others," and to this rule there is the note of the jurist Simmachus, "When have those who are absent and not informed of a proceeding between others been injured by it?" [b] There is also here a special rule and title that those who have not been present at a trial are not to suffer damage from *res iudicatae* between others. [c] Furthermore, natural reasons also are given for these two rules, because in accordance with true reason transactions should be limited to those who are responsible for them, and should not be extended in their effect. Since, however, as Cujacius says, and it is undoubtedly true, this rule often, though not always, holds, it should be added [d] that he who claims an exception ought to give clear proof for it.

A thing is said to be settled in favor of one who has the rule in his favor. [e] So in fact on this very topic others present an argument, and Alexander says: "This situation has not been provided for by the law. Therefore, we are under the rule, since we do not find your situation to be made an exception to it." [f] The case is an exception "when anyone allows the next in order to act in a matter, the action or defense in which belongs first to himself." It says "the next in order" (*sequenti*), that is, the man from whom the other has the case, as Dynus, Ravennensis, and Albericus have explained in that connection, and very recently Covarruvias asserts the principle in detail in his "Questions of Practice." These same writers and Cujacius say that he who had been called "the next in order" (*sequens*) would then be called "the owner" (*dominus*) in this law. A verdict, says Covarruvias, injures another person when in the legal proceedings, the rights and ownership of a litigant are dealt with, from whom, as the real principal, are derived and upon whom depend
167 the rights or the ownership of the very person who allows this process to go on with another. Covarruvias deals at length with this matter, and to this discussion he applies also ch. *pen., De re judicata,*[2] which has been derived undoubtedly from l. *saepe,*[3] [g] for

[1] [*Dig.*, 42, 1, 63.] [2] [*Decrtl.*, 2, 27, 25.] [3] [*Dig.*, 42, 1, 63.]

most of the material in Gregory, the author of that chapter, is taken from the civil law.

[h] Furthermore, I add that his rights pass from the principal, and do not return to him. For instance, Hostiensis and Baldus remark in this connection that a verdict pronounced in a case where a secondary owner appears does not take notice of the principal, although a judgment given in his favor would benefit the secondary owner, because the right in this case would pass downwards, not upwards. Baldus also writes that what is found in l. *saepe* [1] should be added. This law has cases, which, playing the part of rules, show where a *res judicata* between certain people injures others. They show that it is necessary in this situation to have the right of the third party emanate from the litigant, for the case in this law, when "the debtor has suffered the creditor to go to law concerning the ownership of a pledge" would not stand in our way. It shows rather that it is not necessary to have the right of a third party come from a litigant, just as the right of a debtor in a case where the ownership of a pledge is involved does not come from a creditor who is a litigant. [i] The case would not stand in the way, says Covarruvias, because in the Florentine books a different reading appears, viz., when "the creditor has suffered the debtor to go to law." He mentions in addition Albericus, Comanus, Alexander, and others who approve the Florentine reading, and disapprove the other. [k] I mention also Duarenus, who writes that the Florentine reading seems to him the more correct. There is Cujacius also, who defends the same reading from the books of the Basilica,[2] and says that this reading in the law is now accepted "by everybody." Donellus also supports it, in commenting on this law. [l] Even the very learned Laderchius approves it in his responses. Pray, what need is there of explaining in general the authority of these books? [m] Else- 168
where I too have spoken on this subject. [n] Besides, Socinus remarks that it would be hard to think of departing from the original text (he is talking of the Florentine text). Even if that case were not there, Alexander and Covarruvias actually reach the conclusion that the view is not correct, that a verdict pronounced against the creditor may injure the debtor, because nowhere in the law and by no method of reasoning could it be proved. In point of fact, others seem to have been led to form this opinion, that a creditor may prejudice a debtor, on no other ground than that furnished by l. *saepe,* although they have collected abundant evidence later, on which to bolster up this opinion, so that what Cujacius has most excellently said would apply here: [o] "The edition of the Florentine Pandects has fortunately taught students of law the correctness

[1] [*Dig.,* 42, 1, 63.]
[2] [The Greek code of Roman law commenced about 876 A.D. by the Emperor Basil I.]

of many things and the incorrectness of many others. It has to a great extent overthrown the teachings of Bartolus and similar interpreters." The point is made with equal propriety that [p] very many errors made by the doctors have passed over into the *Decreta*. [q] Indeed, as the same doctor and others teach, *Decretales* have been made out of many glosses of the civil law. This point would count there too if perchance the above-mentioned ch. *pen.*[1] shall be urged against this party, although "the next in order" (*sequens*) in that case would be no other than he is in l. *saepe*,[2] as also the words show which are subjoined to it in that passage and which are to be connected with the same case, as Covarruvias explains. The discussion of this point is difficult, yet in it I support the opposite side to that defended above.

Now, I acknowledge the rule that a *res iudicata* between certain persons should not injure others, [r] but I also say that there are more than thirty limitations to this rule. I assert that even accepting Dynus's interpretation of the words "next in order" (*sequenti*), i. e., that he is the prior owner and therefore the person who precedes, not the one who follows—I assert that it does not, however, follow that the law would say that damage is done to others only when the *sequens* [*i.e.*, owner] brings the action. The reasoning of the law teaches a different principle, that the knowledge of a third party who can forbid an action and his tolerance of the action are taken in the
169 light of consent and of instructions in judicial matters. [s] This reasoning has been commonly accepted in this case by all civilists and canonists, and this reasoning furnishes us with an argument against the Dutch who have suffered the navigator to go to law about the ship's merchandise which they say is theirs. He who can prevent another from acting, and yet does not do so, clearly prejudices his case. Now, these Dutchmen could have stopped the navigator. Covarruvias, who does not support the general line of reasoning, regularly held and mentioned above, ought not to influence us. Against the common reasoning he turns also ch. *pen.*, *De sent. et re judicata*.[1] [t] Now, it satisfies the law, if the man who allows action has his case from him who goes to law, or if he who goes to law has his case from him who allows action, if either of them has a case from the other. For the decretal mere knowledge of the legal action and tolerance of it is enough. [u] So Ancharanus says that it is the "common rule" that the third party who knows that another is taking legal action concerning a matter which pertains to him, and permits it, if he does not make opposition, and make opposition in fact by appealing against the verdict, "cannot hinder the execution of the verdict." Likewise Innocent "in all his dicta holds" to this point,

[1] [*Decrtl.*, 2, 27, 25.] [2] [*Dig.*, 42, 1, 63.]

that "mere" knowledge of the legal action prejudices his case to this extent, that he may not hinder execution. All these words are those of Ancharanus. [x] To the same effect are also the more recent commentators on the law. Duarenus says that a *res iudicata* injures other people who know that a person is taking action and permit it, although they have the power to prevent it. Donellus also says that a legal verdict and the authority of *res iudicatae* make a *res iudicata* injurious to him who could have gone to law in advance and stopped the other. And in the case of these more recent commentators we should notice that they follow the Florentine reading, and yet in general also teach the doctrine mentioned. [y] Even Cujacius teaches it, and says that mere knowledge is enough, and knowledge is "seeing and permitting." [z] This doctrine Cravetta also teaches concerning knowledge and tolerance from the same l. *saepe*.[1] [aa] These 170
principles, says Parisius, "the entire school of the doctors holds." [bb] In other later writers also we read that "mere knowledge" is enough, and they add that it would not be necessary at that point to ask whether he who took part in the suit was a person with a legal standing or not; furthermore, they cite also the points noted in l. *saepe*. [cc] The man who is informed is held to be the same as one who gives up a claim, as others put it. So this is the line of reasoning mentioned, and taken into account by everybody in this whole discussion—knowledge, power to prevent, tolerance.

Covarruvias fights very hard against all scholars in maintaining that the exception noted in the decretal is a single case, yet there are two and they are commonly regarded as two. However, he combines them into one case, so as to prove that his third party required in these circumstances is always present, when he who allows an action has a case from the litigant. That case is a single one, but without counting that mixed one there is another. Thus the decretal clearly distinguishes two cases, as do the gloss and the rest of the [dd] civilists and canonists. "It presents the rule and two cases which are exceptions," as Ancharanus and Panormitanus say in commenting on the decretal, and in the same connection Zabarella observes, "It fails in the two cases which are excepted here." Covarruvias is entirely opposed to the common opinion in these discussions, entirely. [ee] He approves no reading of l. *saepe*.[1] The royal laws even do not please him. We reject his statement that the cases in the said law are like rules. Reason is the rule. Cases are cases, and do not restrict reason or the rule which comes from reason. [ff] The connective "like" (*veluti*), which the jurist uses in the said law, shows well enough that they are cases.

[1] [*Dig.*, 42, 1, 63.]

One may also maintain that the authority there of the Florentine text is not superior to that of the other texts. All the commonly used books and the editions of Noricum, as well as the doctors, regularly have that case "of the debtor" suffering the creditor to go to law about the ownership of a pledge. [gg] Zasius boldly defends
171 both the case and the reading. Furthermore, the case furnishes another reason for us, to this effect: The debtor who allows a creditor to take legal action prejudices his case; therefore the owner also who allows the navigator to take legal action prejudices his case. The nexus of the argument is [hh] that the creditor both holds possession for the man who is in his debt, and is his agent; the navigator both holds possession for the owner, and is his agent. [ii] Besides, we understand that everything was pledged to the navigator as security for his freight charges, although action was not taken against the navigator on this score—in this case it would not have damaged the owners—, but action was taken concerning the ownership and possession of the property.

It may not be urged against me that the Florentine reading is better than the rest, for even from the Florentine reading we very often depart. [kk] They say that it abounds in numberless mistakes. Even though that edition has always been known and taken into account here, yet ordinarily the other has been more approved—undoubtedly it has been just as highly approved. [ll] "Each text is good," says Angelus. Even Albericus does not reject the good commonly accepted text, although he calls the Pisan [1] better. Even Comensis does not call this commonly accepted text false, that is, at variance with the law, and not to be retained, although he would consider the Pisan the most accurate. This is often the case, that diverse and adverse readings are defended in the same passage. [mm] Now, Alexander did not simply reject the common reading, as he indicates. I do not forget too the fact that the other reading has been accepted for a long time. Consequently, it should not be rashly changed, [nn] as Alciatus says in another similar inquiry.

[oo] Besides, whatever may be true of that reading, the principle is commonly held that it is to a debtor's prejudice to suffer a creditor to go to law about the ownership of a pledge. What then shall be done in practice, if Alexander, Covarruvias, and some others argue to the opposite effect? For this reason is not the common opinion to be followed in practice? [pp] The common opinion ought to be fol-
172 lowed, even if the opposite opinion seem more correct. [qq] We shall not depart from the common view even for Bartolus, not even on a disputed connective, not even if six or seven hold views opposed to it, not even if the Pope does. We shall not, even if it is not proved by

[1] [The Florentine MS. was at Pisa in the middle of the twelfth century and was carried off by the Florentines on their conquest of Pisa in 1406.]

a conclusive reason, or by a sufficiently sound law. [rr] Nay, we must hold to it, even if the rule of the law or some law should expressly stand in the way, provided the doctors have seen the law, and have interpreted it, "even if incorrectly," for there would be a strong presumption of truth from the writings of so many doctors, that either that rule or the law does not establish the case, or that we are departing from it for some just cause or reason. [ss] Commonly accepted opinions today have the same authority as the responses of wise men had in olden times, and from these it was not lawful for a judge to depart. They are regarded as law, and they come under the head of law.

What, pray, are the arguments on the other side? Take the distinction made by Zasius, and repeated by Covarruvias himself, in which he defends the common interpretation. The first two reasons given on the other side by Covarruvias are of no weight. Indeed they constitute one reason, not two reasons. The defense of ownership, he says, belongs first to the creditor, so that the debtor cannot keep him from it. This doctrine we say is not proved by the laws brought forward by Covarruvias, or by anybody else. The creditor may maintain, and it would be enough for him to do so, that the property was among the goods, was even in the ownership of the debtor at the time when the pledge was given, but simply that he could not defend the ownership against the will of the debtor.

The third reason of Covarruvias is also of no weight, for apart from that case mentioned there the doctrine held by me could indeed be proved in another manner. [tt] Alexander indeed replies neither to the dictum of Bartolus on this point nor to the reasoning. [aaa] "In the case of a creditor who is sued it clearly holds," says Bartolus, that a verdict pronounced against him prejudices the case of the debtor, "for by reason of the very fact that the debtor has handed over the pledge to him, he seems to have granted him its defense." 173
With the dictum of Bartolus also the rest agree, even Alexander himself. He argues about the reason, and yet he does not rightly adopt it in the case of a creditor who sues, [bbb] for it is quite easy to make a defense. He equivocates in citing the case of a mortgage, when a discussion about ownership is presented. He equivocates in discussing the reasoning of Imola. Imola's reasoning is that the debtor seems to have given his consent to the creditor at the moment when he does not oppose the litigant, while Alexander argues as if Imola were talking of a permission granted from the very beginning, when the pledge was given. But his final recourse is to extrajudicial and minor points, as if what is said concerning the mandate were covered in them; for instance, he states the doctrine which applies in the case of a usufructuary and a creditor.

This recourse is of no avail in the case before us, [ccc] for the navigator is covered more particularly than any other such person with an agent's power for the special reason involved in necessity and greater utility, as the laws and the doctors observe. Besides, the care of the "whole" ship and, therefore, of the property, whatever it is, is committed to the navigator. But to the creditor and to the usufructuary his own right, not that of the owner, is intrusted. [ddd] Furthermore, possession, which has been intrusted to the navigator and must be protected by him, is always a matter of small weight. [eee] Observe also that the knowledge and consent of the owners in this case extend the right which the navigator had before, and give him a fuller mandate to defend steadily what may be their right of possession, which they know to be the only thing at stake. Thus in this case the argument would be most effective that a verdict pronounced against the navigator is understood to be pronounced as it were against the agent, and therefore may clearly injure the owners, and in this case the discussion concerning the transaction between others would not arise, since the agent and the owner would be the same person. [fff] The argument cited above then holds, when the person is clearly another; [ggg] when he is not clearly another, the verdict
174 pronounced between others does injure, [hhh] and it suffices if he be the same by a fiction, as, for instance, a verdict pronounced against administrators injures their principals; [iii] while a verdict even in part pronounced against the defendant injures the owner to some extent as well. But we in this present matter rather urge the mandate, [kkk] and this would be a mandate not only extended, but also introduced, or rather presumed to be that of one who knows and permits an action, although he can prevent it, as the common opinion at least runs, and the opinion confirmed by the decisions at Naples and Rome. And yet Vasquius both calls the contrary view the common one, and defends it by twelve arguments, and even by l. *saepe*,[1] where this case is not found. But you will easily answer the arguments of Vasquius, which concern either the rule or extrajudicial points.

[lll] The fact is especially recognized in judicial matters that he who keeps silent seems to agree, and this answer Bertrandus makes in this connection, and he holds the view mentioned about the presumption of a mandate. [mmm] Similarly Menochius shows at length, in his book "On Presumptions," that we take it for granted that he who keeps silent consents, if "this one condition" is satisfied, that the person in question could have prevented the other from making a defense. This is true even when great loss is involved on the part of him who keeps silent. Whatever other view many have held on this point, they were not correct. The situation is much more convincing, if

[1] [*Dig.*, 42, 1, 63.]

some supporting circumstance, [nnn] for instance, fraud and deception, is combined with silence, if even the trial (we mean this trial now) is a heated one too. In judicial proceedings the party who keeps silent is always regarded as the consenting party, and this case expounders of the law everywhere accept, and this is what Menochius teaches. [ooo] Thus others in the case of an extension say, and even Vasquius himself says, that it would be more commonly accepted and safer.

Now, it would not stand in the way of these arguments that Menochius also teaches that they do not hold in the case of one who is absent, nor even in the case of one who is present, if he is ignorant of what is going on—these two points I hear whispered about by our adversaries—[ppp] for we have shown that they all knew, and we 175
have said that some of them were present, and it is undoubtedly true. Besides this doctrine of Menochius seems to hold for matters outside the court, since nothing is said of presence in l. *saepe*,[1] and Ruinus, cited by Menochius, is talking of extrajudicial matters, and if this were not so then there would be no special provision in the case of judicial matters. Finally in our case we ought to remember that the mere inconvenience of the owners is not at issue, when the defense of their property is undertaken, and in the case of the navigator the dictum of Menochius would not hold, for what has been handed over to the navigator under the mandate belongs in this case altogether to the absent owners. Indeed, several other replies can be made to the same effect.

a—Cod. lib. 7. tit. 60. ubi Cuja.
b—Cod. lib. 7. tit. 56.
c—Alex. l. saepe. n. 9.; Schurp. 2. cons. 95.; Panor. c. pe. de re ju.; Vasq. 5. contr. 23.
d—Alc. 8. cons. 95.; Decia. 2. cons. 47. et lib. 5. cons. 22. et 59.; Ever. in lo. ab except.
e—Alex. l. saepe. n. 98.; Burs. 2. cons. 203.; Bero. 2. cons. 102. n. 41. 43.
f—l. saepe.; Covar. 13. pr. col. 13. et 14.; Cuja. 12. obs. 25.
g—Cuja. d. c. pen.
h—gl. Host. Bal. Pa. c. pe. de ca. po. et pr.
i—Covar. d. c. 13. col. 12.
k—Duar. l. saepe.; Cujac. d. obs. 25.
l—Lader. cons. 175. num. 1.
m—Alb. disp. de lib. ju. ci. c. 2.
n—Soc. ju. §. Cato. num. 9.
o—Cuja. 6. obs. 7.
p—Cujac. 22. obs. 16.
q—Cujac. c. 3. ut li. non cont.
r—Vasq. d. 23. n. 15.
s—Com. l. saepe. n. 2.; Imo. 3. 23. 24.; Alex. 18. 87.; Pan. 2. cons. 3. n. 8. et d. c. pen. n. 12.; Fely. 15.; Aret. l. 1. n. 53. de adq. po.; Scot. resp. 19. lib. 6. to. 1.; Ro. decis. 2. de resc. in antiquior. et dec. 14. de prob. in nov.
t—Ang. Imol. Castr. Alex. l. saepe. prin.
u—Anch. cons. 333.
x—Duar. meth. ad tit. de re jud. c. 3.
y—Cuja. d. 25.
z—Crav. cons. 271. fi.
aa—Paris. 4. cons. 76.
bb—Lanar. cons. 65. n. 13.

[1] [*Dig.*, 42, 1, 63.]

cc—Rol. 1. cons. 59.
dd—Com. l. saepe. n. 2.; Imo. 24.; Alex. 20.
ee—Covar. d. c. 13. col. ult.
ff—Bero. c. 1. n. 55. de off. del.
gg—Zas. int. sing. pen.
hh—Alex. l. hoc amplius. §. quaesitum. de da. inf.; Ias. l. 1. §. per servum corp. de adq. poss.
ii—Strac. de nau. p. 3. num. 29.
kk—Fab. 2. Sem. 14.; Alc. §. Cato. n. 23. in Aven. n. 27. in alia lect.
ll—Ang. l. saepe. n. 2.; Alb. 1.; Com. 4.
mm—Alex. l. saepe. fi.
nn—Alc. d. §. Cato. n. 23.
oo—Menoch. cons. 319.
pp—Rip. 2. resp. 1. ad Treb.
qq—Dec. cons. 181. 149. 239. 270.; Ro. 179.; Alc. 1. cons. 34.
rr—Burs. 2. cons. 203.
ss—Wesemb. §. responsa pru.; Decian. 2. cons. 70. 87. et vol. 3. cons. 31.; Gail. 1. obs. 153.
tt—Alex. l. saepe. num. 98.
aaa—Bar. l. saepe. n. 3.; Pan. c. cum. sup. n. 19. de re jud.; Negus. de pign. p. 6. mem. 3. n. 41.
bbb—gl. l. 11. §. hoc jure. de exc. re. ju.
ccc—l. 1. §. magistr. autem. ubi Bar. Al. Ang. Saly. de exerc.; Rui. 3. cons. 66. n. 17.
ddd—Ias. rep. l. admonendi. nu. 273.; Imo. l. saepe. n. 30.; Dec. cons. 28.; Ferr. 220.
eee—Imo. l. saepe. n. 22.; Alex. 87.; Ias. l. quae dotis. nu. 76. vers. Quartus casus.; Soc. ma. l. 10. lim. 7. C. de procur.; Ceph. cons. 272. num. 112.; Stra. mand. n. 18.
fff—Alex. l. saepe. n. 69.; Menoch. cons. 421.
ggg—Zuccar. cons. 35.
hhh—Soc. l. 4. de exc. rei jud.; Cioff. 1. cons. 45.
iii—Alb. d. §. hoc jure.; Alex. l. saepe. n. 92.
kkk—Vasq. d. 23.
lll—Bertr. 4. cons. 393.
mmm—Menoch. 6. praes. 99. n. 15. 18. 22. 39. 43. 44. 58. 59.
nnn—Etiam fraus hic adversariorum. sup. c. 8.
ooo—Suarez. thesaur. rec. sent. scientia. patientis.; Rol. 1. cons. 170.
ppp—supra. c. 7.

CHAPTER XII

On the Same Argument concerning a res judicata *between Certain People Which Injures Others*

Alexander [a] mentions many conditions which must be met that a verdict pronounced between certain people may injure others. He affirms that the citation of the third party at least by a general proclamation is required, and that Angelus holds this view. [b] Notice also that Bologninus supports this dictum of Angelus vigorously against Imola, who alone has seemed to oppose it, although he ought to yield, in Bologninus' opinion, to the authority of his teacher Angelus, for the others who do not consider citation necessary, we may understand, are thinking of a special citation, so that their views would harmonize with the views of those who consider citation necessary. In like manner also we may understand that the glossator on the l. *de unoquoque, ff., De re judicata,*[1] is thinking of a special citation, for this law is talking of a special citation, just as the glossator is in the limitation which he applies in discussing l. *saepe.*[2]

The objection may not be urged that l. *saepe* speaks in general only of knowledge, because, when anything is required, all that 176
also which leads up to it and is required by the verdict under l. *saepe* ought to be included. Now, knowledge calls for notification, and notification in this case comes either from a public edict or from a proclamation. He says further that it is wicked and cruel that a verdict should hold against one who has not been cited, for perhaps the defendant would have brought forward reasons which would have led the judge to give his verdict in another way. This is what Bologninus says. [c] But Imola does not stand alone in holding an opinion against Angelus on this question; Alexander holds the same view. Bologninus has done wrong in concealing the name of Alexander, who was his teacher, for he must have known that Alexander took the side of Imola, inasmuch as he tries to overthrow the fundamental arguments of Alexander. But still he cannot do it, for the l. *saepe* calls for knowledge, and makes no distinction as to the source from which it comes. There would be nothing wicked in the present case, in consequence of which our opponents may complain of their treatment, since they have known about the suit, and have not opened their mouths,

[1] [*Dig.*, 42, 1, 47.]

[2] [*Dig.*, 42, 1, 63.]

and have not brought forward their reasons. [d] Bologninus is himself an unworthy guide; he has not a very keen mind, nor is he well acquainted with principles, and this is the opinion which well-trained writers express about him.

[e] That no citation is required in this case even Parisius teaches, as well as Decianus, Menochius, and all the writers on canon law. All those who write that "mere knowledge" is enough hold the same view too, [f] as Castrensis and Panormitanus remark. Panormitanus also speaks explicitly against the need of a proclamation. [g] So does Socinus, on the ground both of l. *saepe,*[1] and the said decretal.[2] [h] Similarly on the ground of the same law, Cravetta and others say that a legal action between certain people prejudices another who knows of it and suffers it, even to the fullest extent. [i] Likewise on the basis of the same law Tiraquellus says that he who has the first right of action concerning any matter, or the right of defense, and suffers the next in order to bring action, even if he has not been summoned, is just as much prejudiced by a *res iudicata* as if he had himself brought an action or made a defense—as if (I
177 will add this to the preceding clause) "the debtor should have allowed the creditor" to go to law concerning the ownership of a pledge, etc. [k] A man who is informed does not need to be informed; knowledge takes the place of a warning; where knowledge is enough, it makes no difference whence it comes. [l] Further, Angelus speaks of the citation of a man who for other reasons had to be cited, but not of the necessity of citation in the exceptional cases with which we are now concerned, where knowledge only is required, and in this way the very learned Hondedeus explains the passage in Angelus. [m] The younger Angelus asserts that this is the dictum of Perusinus, when a verdict of itself harms. Well, enough on this point of citation, if this objection shall be urged against us by our adversaries.

[n] It is required also that he who goes to law be an opponent with a legal standing, in order that the verdict may injure another, and he is said to have a legal standing, whom the case, which affects another indirectly, chiefly concerns, and undoubtedly the master of the ship is not such a person. But there is more than one sense in which one is called a defendant in legal standing. [o] Menochius (let us note this point first), in harmony with Covarruvias, very properly makes three distinct categories of the verdict which injures a third party, one derived from the nature of the case itself, another from knowledge of the suit, the third from an irregularity. Now, it is the *first* category that has to do with *this* definition of a legal defendant, so that, in consequence, outside of the said category a legal defendant of such a sort is not required. [p] Therefore, Menochius also, in dis-

[1] [*Dig.*, 42, 1, 63.]

[2] [*Decrtl.*, 2, 27, 25.]

coursing on these many conditions which were said by him to be required to the end that a verdict might injure another person, on his point concerning the defendant writes to this effect: "It is clear that a defendant has been present in a case where many have appeared and contended very vigorously for admission to the division of property which others were hoping for, while no verdict pronounced against the first parties stood in the way." The legal defendant mentioned by Alexander is required in case the suit, on account of its own character, must and can prejudice. [q] Others, as well as Alexander himself, add this condition. Similarly Imola aptly 178
applies this condition to a case of this sort. As for Alexander, in a confused way, as applying to these three or more cases of a verdict which injures, he mentions both this point about the legal defendant and eight other points, as one sees at the very beginning of his narrative. Now, it is very clear to one who looks into the matter attentively that all these nine are not required for each case individually. There is a fourth case in Covarruvias when a verdict injures the third party because of some single result, and with this case and with the third case what have the most of their nine points to do? [r] What has the knowledge mentioned to do with the first kind? The case where knowledge is required calls simply for a common knowledge, in the present instance on the part of the defendant, as I just now remarked, in quoting from Menochius and others. [s] When the verdict touches the third party "in no wise," then (says the doctor quoted by me) it would be absurd to say that even in consequence of the citation itself the third party would be prejudiced. [t] Furthermore, the bond of interest is established through either the persons or the cases, or the matters involved. [u] These three ought to co-exist that an exception to a *res iudicata* may stand: the same thing in dispute, the same cause for seeking redress, the same condition on the part of the persons involved. Now, in the case before us the first link exists, for the navigator has charge from the owners. The second one exists, because the owners are themselves obliged to defend the suit in the same way in which the navigator defended it. The third exists because the things in dispute are the same in this case.

Now, on the first argument no one may say to me [x] that a verdict pronounced against a tenant does not injure the owner in whose name he holds possession, and, therefore, a verdict which has been pronounced against the master of a ship would not injure the owners, [y] for he is hired, as it were, [z] and those hired hold possession, not for themselves, but for owners. [aa] Where different persons are involved, in that case a verdict does not injure any other person than the one against whom it has been pronounced, even if one and the

same matter be at issue. These points may not be made against me,
179 [bb] for a verdict pronounced against a tenant injures the owner, if he knew of the verdict only, and makes no appeal—at least it injures him in the matter of possession. So the objection is turned against our adversaries, and when it is said that an owner is not injured by a verdict against a tenant, in that case the statement made has ownership in mind, and ownership is not intrusted to a tenant, since possession is granted to him, or the question involves an owner who does not know of the suit. [cc] If it is even said that no injury is done in the matter of possession, that applies to civil rights which have not been granted to the tenant. [dd] The common opinion is that knowledge of a suit injures a third party in the matter of possession, and Cravetta urges this point vigorously, and he urges the common view when " the third party " holds possession, and this should be observed, for [ee] " in this case (said Covarruvias) without doubt a verdict ought not to be handed down for execution." Romanus says that a verdict will " never " be handed down for execution against a third party who has possession, even if he shall have known that his own interests were at stake, and even if he shall have received a summons and kept silence, for he may wish to retain possession only, although he would not be heard, if he wished afterward to take action against the man who had a verdict in his favor, for an exception to the *res iudicata* would stand in his way. [ff] Even Zucchardus holds the same view, and he also cites Castrensis. [gg] Imola too holds this opinion, and he cites Bartolus as well and he adds here an excellent point in practice, which others also set down elsewhere. As for myself, I say that one should see whether the right of possession of the defeated and third parties is the same or not, for in the second situation it would surely be a more correct and the common view that a verdict pronounced against one person does not injure a third party who knows and is in possession, but this third party will be able to hinder execution on the ground of possession only. Jason gives evidence of this common opinion and sets it forth, and Cravetta does not oppose it in this connection, or does not oppose it effectively.

But if there is the same right of possession for both, one ought
180 not to doubt that a verdict injures the third party; for instance, a verdict brought against a tenant, who holds possession for an owner, injures the owner; one pronounced against a navigator, who holds possession for owners, will injure the owners. [hh] Surely he " in whose name possession is held " holds possession. " An agent gives his services in behalf of another's possession," and the possession in this case of that other person is real.

No one may oppose me by saying that the verdict pronounced in this case against the navigator does not injure the owner, because

a verdict may injure a third party only when the litigant takes action in his own name, not in the name of the third party, [ii] as Bartolus puts it, and that in this case the navigator brought action in the name of the owners, not in his own name. This point may not be urged against me, I say, because it is a very doubtful one, and may be well argued on both sides, [kk] as Alexander shows in discussing the question through five columns and in citing besides many authors on the one side and the other, and in bringing forward strong reasons on the one side and the other. Although he seems to conclude with the opinion of Bartolus, which I have mentioned, [ll] still Bertrandus thinks that even the opinion of Alexander to the opposite effect inclines more to Innocent. Bertrandus himself follows Innocent, and even Alexander makes an exception of very many cases in which the opinion of Innocent should be followed.

[mm] Now, there is one case, which is called the seventh by Alexander, in which those in whose name legal action has been brought have been not only informed but even present, so that the matter which has been adjudicated surely injures them, and this point would count against those adversaries of ours who have also been present during the litigation. They have no hope. The judge may not listen to them on any pretext. Furthermore, the case which was cited as the first one by Alexander, and reported by us in the preceding chapter, of the agent who goes beyond the limits of his mandate, serves us as a reply to all of them. The agent is no other than the owner. At this point there is no place for the dictum, [nn] that a verdict, although it may at times benefit the other party, still may never injure 181
him. Although that dictum does apply, if there be no connecting link and unifying principle. Here knowledge is the justification. [oo] Furthermore, knowledge in respect to the matters which come into dispute is enough. [pp] Manifestly knowledge is proved by probable inferences; it is fully proved by several presumptions which dovetail into one another, etc., [qq] and in this case knowledge even of the action which followed, dealing with the appeal of the navigator, is enough for us, as Imola and Alexander assert, and they are talking with reference to a third party who in our case is not even a third party.

a—Alex. l. saepe. n. 16. 70. 82. 83.
b—Bologn. cons. 77.
c—Alex. d. 16. 82.
d—Zas. l. frater a fratre. praef.; Ang. 3. em. 3. et lib. 4. c. 16.
e—Dec. 3. cons. 54. et lib. 5. cons. 21.; Menoch. 421.
f—Castr. l. saepe. n. 3.; Pan. c. pen. n. 35. de re jud.
g—Soc. de cit. n. 5. col. 3.
h—Crav. cons. 271. fi.; Rom. 343.; Castr. l. 29. de inoff. test.; Fulg. l. 1. n. 7. C. de adv. div. judic.
i—Tiraq. res int. al. ac. lim. 20.
k—Cyn. l. 3. C. de novat.; Menoch. cons. 270. 825.; Tiraq. de utr. retr. §. 36. gl. 2. num. 28.

l—Hond. 1. cons. 28. num. 33.
m—Ang. Aret. l. si perlusorio. de app.
n—Alex. l. saepe. nu. 76. 77.
o—Menoch. cons. 319. num. 4.
p—Menoch. cons. 390. num. 41.
q—Saly. l. 2. n. 2. C. quib. res jud. non noc.; Imo. l. saepe. n. 17. 18.
r—Castr. l. saepe. n. 4. l. 29. n. 3. de inoff. test. et C. qui. res ju. non no. num. 3.
s—Non. cons. 77. num. 10.
t—Bologn. d. 77. nu. 2. 3.
u—Imo. cons. 130.; Decia. 2. cons. 54. num. 57.; Menoch. 934. n. 43.; l. 12. ubi gl. de exc. rei jud.
x—Inn. c. ult. n. 8. ut li. non co.; Decia. 3. cons. 118.
y—gl. l. 2. de le. Rho.; Cuj. 2. obs. 28.
z—l. 1. C. comm. de usucap.
aa—Duar. l. saepe. prael. 42.
bb—Imo. l. saepe. n. 29. 30. 31. 32. 93.; Alex. 113.; Fely. c. cum super. n. 12. de re jud.; Rui. 4. cons. 163.; Alc. 8. cons. 67.
cc—Ias. 2. cons. 176.; Alex. l. 44. §. 1. de acq. poss.
dd—Contar. si de mo. po. lim. 23.; Crav. cons. 997. n. 10. 11.
ee—Covar. pr. 16. col. 4.; Rom. cons. 342.
ff—Zucch. cons. 30.; Castr. l. a divo. §. si super. de re jud.
gg—Imo. cons. 55.; Ias. d. §. si super.
hh—l. 18. de adq. poss.; Corn. 2. cons. 229.
ii—Bar. l. saepe. n. 4.
kk—Alex. l. saepe. col. 25. in med.
ll—Bertr. 4. cons. 393.
mm—Alex. l. saepe. n. 93.
nn—Ias. l. 2. §. ex his. fi. de V. O.
oo—Decia. 5. cons. 91.
pp—Calcan. cons. 23.
qq—Alex. l. saepe. n. 21.; Im. l. 5. n. 17. de app.

CHAPTER XIII

To What Extent a res judicata *May Injure a Third Party, and concerning His Appeal and the Impropriety of Delaying the Execution*

A *res iudicata* prejudices a third party also. [a] A *res iudicata* creates a right; it is accepted as the truth; no one is listened to who speaks against it, etc. It even injures a third party when carried to the point of being half-proved, in such wise in fact that the rest of the case may be finished by taking an oath. [b] This is the teaching of Bartolus, which is followed by Butrius, Ancharanus, Panormitanus, Romanus, Alexander, Socinus, Decius, Tiraquellus, and Menochius, who cites them all and says that the view ought not to be called in question. [c] To these writers I add Alciatus, Decianus, Purpuratus, Ruinus, the Rota of Genoa, and Gozadinus, who testifies about all of them as holding this opinion in his note to l. 2, *Code, De edicto.*[1] The people who talk of the opposite opinion as the common one are absurd. Even those who differ from Bartolus are on his side, when there is any connection between the cases or common element in them, as there is in ours. This opinion ought to be held, as at least 182
midway between the two views, and as reconciling other opinions. But if the third party is injured by the verdict, and does not appeal from it, then it is transformed into a judgment against him.

[d] Sometimes the third party cannot appeal; he cannot, if the man against whom the verdict has been pronounced could not. [e] When he can, he is surely under obligation to appeal, that is, if he has neither protested during the trial when the other was concerned, to prevent it harming him, nor removed from the suit the litigant whom he could have removed. [f] He ought to have appealed in that manner and time in which he might have appealed, had he been defeated himself, within ten days from the time when he knew that the verdict had been pronounced, [g] for he who does not appeal at the appropriate time seems to agree to a verdict and to give up the right to appeal. Likewise negligence at least is shown on the part of one who could use suitable remedies and has not used them. Furthermore, there is no way of going back to what has been renounced. [h] What shall I say to the fact that without an appeal a new trial is started by a third party, and that therefore execution ought not to

[1] [*Code,* 6, 33, 2.]

be delayed even when it injures the right of the third party? This is what Cravetta responds and what Covarruvias thinks, and nobody has expressed a different opinion. [i] When a verdict does not injure, a third party who is concerned may come forward and make opposition after execution has begun. But here it does injure.

[k] In a case of doubt a verdict should be so interpreted as to injure less the third party—so as not to injure him at all. But here we are not in doubt, since we have accepted opinions. [l] Accepted opinions do not leave the matter in doubt, but make it clear, [m] or if we follow arguments of the sort [made by our opponents], surely nothing will have been so clear that it cannot be obscured. In addi-
183 tion I shall make short work of the argument here, that if one ought to pass judgment in this way in a case of doubt, so that a verdict may not injure a third party, for the reason that this would be the less injurious course, by affirming that on that ground the execution of the *res iudicata* in this suit for possession will not be hindered to our prejudice, because it is this that would be the less injurious course.

Without violating any of the rights of our adversaries, execution can be made for us. [n] To delay it is a matter of no ordinary prejudice. This is a serious matter and of public importance, that the authority of *res iudicatae* should be frustrated in this way. [o] Even when prejudice has not been done to a third party, still it does not follow from that that execution should not be made. [p] Now, in this case slight knowledge is enough when a third party resists the execution of a verdict, since his right in respect to the property has been observed in an ordinary trial. [q] In this case our adversaries ought to be condemned, and condemned to pay the costs of the entire action against the navigator. They have allowed the ambassador to be tired out by the navigator, and now they come forward to bring action on their own account concerning the same matter. This principle is thoroughly accepted, says Ancharanus, in order that in this way we may check the spiteful acts of individuals and needless expense. Cravetta holds the same view also, noting that an opportunity to transgress would be afforded by the judge, if an execution should be hindered in this fashion, for others in their reliance on a precedent of this sort would contrive similar cunning devices. [r] Execution is not hindered because an action has been moved and exception made which requires somewhat careful investigation.

a—Ias. rubr. de re ju.; Decia. 2. cons. 18.; Io. Fra. de Pon. cons. 6.

b—Menoch. cons. 390. 421. 449. 574.

c—Alc. 6. cons. 68.; Decia. 1. cons. 11.; Purp. ult.; Rui. 4. cons. 28.; Genu. 103. Ro. decis. 184.

d—Covar. 15. pr. n. 3.; Menoch. cons. 345.

e—Contar. si de mo. po. lim. 23.; Covarr. d. 15. n. 1. et c. 16. prin.; Ceph. cons. 279.; Crav. 997. n. 25. fi.; Alex. l. saepe. n. 82. add.; Pan. c. veniens. n. 16. de testi.

f—Fely. c. cum super. n. 9. de re jud.; Cov. d. 15. n. 2. 4. et col. 14. fi. col. 15. prin.; Hond. 1. cons. 28. n. 40.; Rom. 343. n. 16.

g—Rol. 4. cons. 52. n. 23.; Orad. int. ul. vol. 2. cons. 45.

h—Crav. d. 997. n. 6.; Covar. d. c. 16. prin.

i—Anch. d. c. veniens. n. 2.; Fely. num. 4.

k—Rol. 3. cons. 79.; Dec. cons. 445. n. 44.; Menoch. 501. n. 14. & cons. 688. n. 40.

l—Dec. 1. cons. 2.

m—Alc. 9. cons. 104.; Burs. 2. cons. 203.; Corn. 3. cons. 82. num. 2.

n—Panor. d. c. veniens. n. 9.

o—c. 17. de re jud.; l. 57. is, a quo. de re jud.

p—Crav. d. 997. num. 28.

q—Anch. cons. 333.; Crav. d. 997. num. 19. 20.

r—Panor. 2. cons. 5.

CHAPTER XIV

Of Making an Instrument to Cover a Debt, and of Releasing Sureties

TO THE MOST DISTINGUISHED LOPEZ SEDEGNUS

There is no doubt that the most illustrious ambassador may be held to release his sureties who are soon to leave England, [a] for
184 Menochius has very recently taught that sureties who are about to depart must be released, and he cites ten doctors who have taught the same doctrine, but mentions no one in opposition. But the question is, whether the ambassador may be held to make an instrument for them today or give them some other promise that will release them when they depart, or, as the sureties demand, within a fixed time. I should think that a request may not be made for a fixed time, since this would bind the ambassador to an obligation, to which he is not bound; he is held only in the case of departure, but he does not seem to be bound to an instrument valid for this unsettled day of departure, for this introduces either a new obligation or a more binding one. In neither case is the ambassador held to execute an instrument, [b] because obligation implies willingness, not necessity, [c] and because, where the condition of the man under obligation is made worse, he is not held to execute an instrument. But it is made worse, if the obligation is made more binding.

But if the instrument is sought as a proof only, even then the ambassador is not held to execute it, since there is no danger in this case that the proof may be lost, for the law is what binds the ambassador, and the proof furnished by the law, which always has a voice, cannot be lost. The ambassador is bound by the law to release them when they go. Why shall the ambassador add his own bond to that of the law? The law always speaks with a clear voice, and therefore any other proof is called for without reason. [d] Therefore this is the doctrine of Bartolus and the common doctrine, that, when there is no doubt that proof will be at hand, an instrument may not be asked for. [e] Action may be taken in advance to make the claim in the case clear, so that it may be admitted when the time comes. But there is no need of such a declaration in this case, where the law is clear and the voice of the ambassador quite so.

The opposite action to this is taken in behalf of the ambassador, I say, in the other case, when the ambassador asks for an instrument

covering purchase. This is the custom, and it is always uncertain whether the proof of a sale which the ambassador has made will be 185
at hand. [f] The seller is required to make an instrument of sale. Consequently, the buyer also is required to make an instrument of purchase, [g] and in general "anyone can be compelled to make an instrument covering a contract or other obligation." Farewell, most distinguished Sedegnus.

a—Menoch. de arb. cas. 41.
b—l. sicut. de oblig.
c—Ang. l. in omnib. de jud.; Alex. l. si finita. §. eleganter. n. 18. de dam. inf.
d—Bar. d. §. eleganter.
e—Covar. 1. var. 18. fi.
f—Ias. l. ex parte. 121. de V. O.
g—Corn. 4. cons. 120.; Moli. de contr. disp. 337. num. 3.

CHAPTER XV

Of the Rejection of a Judge Held in Suspicion

Appeal has been taken so often from the interlocutory sentences and verdicts of this judge, and so many appeals from him are pending that I think it lawful and right for us in this case to reject him. This case which we have now, and in which we are rejecting him, is not a new one, [a] so that the law, which compels an appellant to plead another case before the judge from whom he has taken an appeal, does not compel us to plead before the same judge. Indeed, action for possession has been taken as a result of confiscation, in order that property which has been confiscated to the Spanish fiscus, and is now claimed by right of ownership, may be handed over to it. In this case neither will action be taken on another point, nor does it arise from another case, nor does it arise between other persons. Therefore, because we are not interested in another case, and because the law is not against us—indeed, is on our side—my argument is from the other point of view.

[b] Under a judge held in suspicion it is dangerous to go to law, as our doctors and authorities say. [c] Even if no law had been passed by man especially about this matter, reason would very easily show, that we ought to avoid and escape by all means in our power the judgments of those whom we hold in suspicion. This is what Covarruvias says. Consider too the fact that for this reason a
186 very just purpose has led to the arrangement that no one be forced to take a judge whom he suspects, [d] and the law says: "Because it is our wish to have *all* trials proceed without suspicion, let him who thinks that a judge is under suspicion reject him, before the trial begins." I know that these statements are not taken of an ordinary trial like ours, but I approve the general reasoning presented here, and I apply it to this judge of ours, who is under very grave suspicion, and against whom other reasons arise which make him liable to rejection.

[e] Are not a hundred reasons noted, for which a judge may be rejected, and are there not other reasons which I have mentioned against this judge apart from this matter of appeals? This judge has always been the advocate of these people against the Spaniards. He is the favorite of the Dutch. When he was made judge, he straightway gave orders to have handed down for execution in be-

half of the Dutch against the Spanish a certain decree of his predecessor, a very well-balanced man, and the new judge had, [f] shame to say, been advocate in that case against the Spaniards, and this decree his predecessor, who had made it, for very just reasons brought forward by us, had never been willing to hand over for execution. Here in another case he gave the privileges of a fiscus to the fiscus of Barbary, to our detriment; in this case he ridiculed in various ways the rights of the Spanish fiscus to our disadvantage. In this case involving Barbary did he read [g] the response of Ruinus which I cited? Did he weigh our oral and written argument against that fiscus of Barbary? At eight o'clock in the evening he was asked by me to examine all the points—at sunrise the next morning he gave a judgment against us. After hearing the representations of six advocates on the other side up to the hour for dinner, right after dinner he gave an interlocutory decree, without examining other statements (I believe this, at any rate), even those of a large number of pleaders, or [h] the opinion of Cravetta (this I know for sure) on which our strongest argument 187
was based. He even did this, although the question involved in this interlocutory decree was so long and intricate—namely, whether a third party may be admitted to delay the execution of a judgment against another—that the resolution of it would not be very easy. He ought to have read other writers; he ought to have read Alexander, who has written a volume on l. *saepe*[1]; [i] this [paragraph in the *Digest*] lacks in system, as even Zasius observes, [k] and the President of the Neapolitan council says that the article is handed down in a confused way by the doctors. Still why do we gather other points? Is there anybody who has heard him or seen him pleading against us, and not felt that he was hostile to us, since that interlocutory decree was handed down? [l] A judge may keep his opinion and intervene in its support, [m] and still he who has been a judge should guard his reputation by not becoming an advocate. What of a man who is even yet a judge? Whether he has acted as a judge should act, do you, distinguished men, consider, before whom he has argued. [n] A judge's attitude is very clearly revealed from his discussion with a party concerned. I say no more of one who is very friendly to me, and a very learned man. These remarks I wish to make, with the kind permission of the judge himself, for the justice of the cause which I defend.

[o] But if on the score of a single appeal pending in another case, it is not lawful to reject a judge, as the common opinion runs, then where there is more than one appeal, it will be lawful to reject a judge. [p] The matter of rejecting a judge is beneficial, as the Rota has decided. [q] Indeed, divine reason and the reason of nature pre-

[1] [*Dig.*, 42, 1, 63.]

scribe that a case ought not to be determined by a judge under suspicion, and numberless reasons are accumulated on this point, on the score of which this rejection may be made, and besides them the discretion of the judge in this connection is still to be considered, who may admit other reasons also. [r] Even a slight reason ought to be accepted, as the decision of the Rota, given by my learned friend, Cantuccius, has it.

In fact, the argument makes it improper for a judge to be ac-
188 cepted in these circumstances, even when other judges are associated with him, because an appeal cannot be taken from the verdict of all these judges, and, therefore, the reasoning of the civil law will not hold, which forces one to take legal action before the same judge in another case, because appeal may be taken again. Still the first reason mentioned is convincing, because here there would not be a different case, [s] for the point mentioned in the law which has this provision concerns a separate case, and one which does not have organic connection with another. This reasoning is conclusive also in the case of an ordinary judge. [t] An ordinary judge, they say, cannot be rejected, but one may ask to have judges associated with him. Although this is true that an ordinary judge may not be simply rejected, for being under suspicion, as another judge may be, still it is not true that he may not be rejected even for a just reason. No one maintains this. [u] In fact, everybody says that it would be correct and would be the common conclusion in the case of an ordinary judge not liable to rejection. But the principle does not hold in certain special cases. The judge is rejected in this case which very largely and almost entirely depends upon a certain article of law, the situation being that this judge, formerly an advocate, defended that view which, if it prevail here, will clearly defeat our whole case. A state of mind, as we all know, may affect even opinions.

a—l. 1. ap. eum, a quo. app. al. ca. ag. comp.
b—Bar. de jud. susp.
c—Covar. pract. 26.
d—l. 14. C. de judic.
e—Ias. add. no. ad d. l. 14.
f—Maran. de app. n. 42.
g—Rui. 5. cons. 158.
h—Crav. cons. 997.
i—Zas. l. saepe. prin.
k—Io. Fra. de Pon. cons. 75.
l—Pan. Fely. c. 26. de rescr.; Bal. rub. C. de pae. ju. qui ma. ju.
m—Fulg. l. quisquis. C. de postul.
n—Crav. cons. 350.
o—Dec. c. ad haec. de app.
p—Ias. d. add. no.
q—Menoch. de arb. cas. 152.
r—Ro. in noviss. vol. 1. decis. 2.
s—Dec. d. c. ad haec.
t—DD. d. l. 14. & auth. seq.
u—Ias. d. l. 14.

CHAPTER XVI

Of an Appeal from an Interlocutory Decree, and of Revision of the Same

Appeal was taken when the judge had admitted certain people who came as third parties to delay a *res iudicata* between others. At the same time also petition was made to the Prince for a revision of this admission. Consequently, two points must be looked into: 189
whether it is lawful to appeal, and whether it is lawful to ask for a revision.

Now, the first question would not be difficult, [a] since it is said to be "quite true and an undoubted fact" that it is lawful in an action for possession, as this one is, to appeal against any irreparable injury whatsoever, done before the verdict has been given. [b] A thoroughly prudent judge will decide that there is a just and reasonable cause for admitting an appeal from an interlocutory decree, when he sees that a loss caused by an interlocutory decree cannot be repaired by a definitive decree. This is the teaching of Menochius, and an interlocutory decree which deals with the admission of persons involves such an injury. [c] Consequently, appeal from it is allowed by Speculator, Johannes Andreae, Baldus in a very full discussion, Angelus, Romanus, and others cited by Menochius and Contardus, and still others, as well as by these two writers, Menochius and Contardus. No one whom I know holds a different opinion, with the single exception of Jason, and, in the single case of admitting witnesses, Fulgosius. Now, Jason, just as he mocks at the opinion of Speculator, which everybody accepts, so in my opinion improperly cites Fulgosius as opposing the others on the general principle. However, these are the words of Fulgosius: [d] "From an interlocutory decree an appeal may be taken, when by it prejudice would be done which cannot be repaired by a definitive decree, and Angelus says that Speculator holds that if an interlocutory decree of a judge shall have ruled that some witness ought to have been admitted, who ought not to have been, one may appeal even under the civil law. He also teaches that the doctrine holds as a general principle when by an interlocutory decree anyone is declared to have a legal standing who has not. But what he says about a witness does not seem to involve an injury which may not be repaired by a definitive decree, as, for instance, if he had made a wrong decision based on the depositions

of witnesses." Thus Fulgosius expresses himself in the single case
190 of witnesses, and even in that case he does not wisely depart from the common opinion, since ([e] as Bartolus and Baldus explicitly respond) the admission of witnesses always creates a certain prejudice. [f] Furthermore, even from the slightest injury one may appeal. [g] An appeal is taken from an interlocutory decree, "the proof of which can bring prejudice or the injury from which cannot be done away with or repaired in an appeal from a definitive decree," says Romanus. Baldus in addition notes several cases of appeal which are lawful in this connection: when the interlocutory decree brings an execution with it; when it excludes proof; when it changes a benefit. These cases fit our situation very well, since to our detriment the execution of the judgment which has begun is stopped by the admission mentioned; we also are prevented from proving that they are not third parties. But I hold that an irreparable injury results from this admission, and from any other admission of persons, [h] because, as Baldus shows, when once admitted, they can never be rejected again, either in the hearing of an appeal or in an action for ownership. Thus it would not oppose my argument, if anyone should allege [i] that an interlocutory decree may be recalled by the judge to whom appeal has been taken from the definitive decree, because the power to recall all interlocutory decrees is reposed in him. There is no difficulty in this first question, where the opinions are common and the reasons clear.

In the other question several points create a difficulty, [k] although a revision is called an appeal of a certain kind, and ought to be considered in the nature of an appeal. In the first place, a difficulty arises, [l] because while a suit is pending a petition for a review would not be lawful, and an interlocutory decree does not interrupt a suit, nor does a suit cease to pend in consequence of an appeal—at least not in consequence of an appeal from an interlocutory decree, [m] whatever may be true to the contrary in the case of a definitive decree. The laws are clear: "To petition while the case is pending is not
191 lawful, unless the publication either of the proceedings between the parties or of the decision be denied." Here, then, two cases only are excepted, and ours is not one of them. Further: "He who has failed to make a lawful appeal must forever keep silence, nor ought he impudently to ask aid of us by a petition, etc." Secondly, where there would exist the ordinary remedy of an appeal, the extraordinary remedy of a petition would not hold. This is also the general rule, and here there is a place undoubtedly for an appeal, as I have said, and it is not lawful to neglect it, as we have heard. [n] A petition is never admitted where an application can be made. This is the teaching of the doctors. [o] The third point is that a review would

be granted, not of an error in law, but of an error in fact, and in this case a review would be asked for, to see whether they could take an action under the law. [p] The fourth point is that recourse may not be had to the Prince when there is not a strong, a very just reason, a very great injury, a grave prejudice at stake, for he ought not to be troubled by a small matter. But in the case of a delay for a comparatively short time, granted to present proof at once of their claim, grave prejudice is not involved. [q] Indeed, there would be slight prejudice in granting a short postponement, the short delay would not be a delay, etc. The fifth point is that a petition has not been made for this review in writing, [r] and still in this case a written document is said to be necessary. The sixth point is—what will make the third parties satisfied—[s] the review will not suspend the execution of the other decree obtained afterwards, under which possession of the property, which had been decreed to us before, is set down to their credit, and appeal from an interlocutory decree does not hinder the judge from proceeding to final measures. [t] The seventh point, and this is explicitly taught, is that one does not petition against an interlocutory decree, and a petition is not accepted even if the interlocutory decree cannot be remedied in a defini- 192
tive decree.

These points create a difficulty in the question and in our case. Still since these arguments and others which could be adduced in support of this same position do not really stand in the way, I think that a revision ought to be granted to us at once, and I am led to think so, because if a petition is not prohibited in this case, surely it is permitted, [u] for the petitioner asks nothing else than that the truth be brought out, and if he has been injured, that the loss be made up to him. Such a petition is in harmony with divine and natural law and with equity, and therefore the Prince ought to grant it. This is precisely the argument of Decianus, and there is a long discourse there with reference to the peculiar duty of the Prince to establish the truth. In the second place, I am led to exactly the same conclusion by the fact [x] that it is lawful to petition against the injury caused by an interlocutory decree, if (as is the case here) mention be made also of the progress and status of the case, for a petition seems to be forbidden to prevent deception. Furthermore, Salycetus sets forth in detail, which " it suffices to give in abridged form," how in such a suit, arising between such people, the judge had given an interlocutory decree of this sort, and, injured by this interlocutory decree from such a cause, he appealed to his royal majesty, that he might petition him to grant an appeal. In the third place, I am influenced by the easy refutation of all the arguments on the other side, so that what I said earlier of the permissibility of a petition which is

not forbidden would follow. No difficulty then would arise from the first point which involves a rule that would not hold here, inasmuch as the case is an exception, although it is not one of the two exceptions in the law, for other cases also are made exceptions by the doctors, [y] and this case of ours, where an interlocutory decree cannot be remedied by a subsequent definitive decree, is thus one of the other exceptions. It is lawful also to petition, while a suit is pending, that another judge be associated with the judge who is under suspicion.
193 [z] This view another law and all the doctors support. This is the petition made in this case to the Prince that at least other judges may be associated with a judge who is under grave suspicion. In this case an appeal is not neglected, but it is added to the petition in accordance with the formula of Salycetus for securing the assignment of persons.

The second difficulty does not stand in the way, because it has been solved by the teachings of Salycetus and of others who combine in this case the petition and the appeal. [aa] The ordinary general recourse and the extraordinary special one are taken as remedies at the same time. Besides, the extraordinary remedy is not a mere subsidiary remedy, and the extraordinary remedy tends to support also the ordinary one, etc. [bb] So the ability to appeal does not hinder restoration to the former state, as the common opinion runs. Likewise failure to make an appeal does not. Thus the second argument on the other side does not stand in the way. Now, as to the fact that a petition may never be accepted when an appeal can be made, it is true that that is the common dictum, and usually held, not always, and the doctors, cited by Maranta, do not hold refusal in that case as the uniform procedure. [cc] Panormitanus says that anyone may apply by way of precaution the double remedy of an appeal and of a petition, when he is in doubt as to which is in place. In the present case this may be said to have been done with perfect propriety.

The third argument on the other side would not stand in the way, because inquiry is made about a very serious error in fact in this case where people have been admitted as third parties, who are not third parties, but identical with the former litigant. [dd] Furthermore, as to the denial of an error in administering justice in this case, that is said with reference to a Prince, for a peculiar position is attributed to him, since it is taken for granted that he who has all justice locked in his breast does not err in administering justice. [ee] The law shrinks from hearing injustice spoken of in the case of such great men. It admits the possibility of an error in fact, from which an error in justice has followed. [ff] It admits the error in fact, although
194 some injustice even may seem to follow from such an error also; no

matter if we do say that even the wisest men are deceived in regard to facts.

The fourth point does not create a difficulty, [gg] because the stay and review, granted by the interlocutory decree, of the execution would cause no small prejudice. The Spanish ambassador would have a very just reason for action. He has failed to ask to have judges associated with a judge who is under serious suspicion; indeed, he has not rejected a hostile judge, [hh] and he had the right even on this score to reject him in every case, because in one case an appeal from him was pending. Or if under the civil law, which we are following in this court of the admiralty, this is not the case, or if the civil law takes another attitude than the canon law, and we should not have that right, at all events we have the right to associate judges, and not to have asked for them could be an error on the part of the ambassador. He had a judge who was under suspicion, and he took care to have him warned by the supreme council of our King, but he made a mistake, because he trusted the authority of the council more than he feared the hostile, irritated temper of the judge. [ii] A revision is granted even when an error is attributed to him who asks revision. Thus the fourth argument also on the other side is refuted. What is said above of a delay for a comparatively short time counts for nothing in this case where the question is not one of time.

The fifth argument presents no difficulty, because in reality in this case petition was made in writing. The ambassador gave to the King in writing a summary of the whole procedure; he gave a letter to the King; he petitioned the King, in the form in which an ambassador should petition a King. [kk] According to the standing of the persons concerned these matters are transacted, as Rebuffus well puts it in this treatise on the subject of petitions. He adds too that oral petitions are of as much weight as written ones; and that the same is true of appeals. [ll] Now, if in the case of an appeal from an interlocutory decree a document is not necessary, as the common opinion stands, and as is undoubtedly true under the civil law, no strong reason will be given why one should be necessary in the case of a 195
petition.

The sixth argument presents no difficulty, [mm] because in point of fact a verdict pronounced after an appeal from an interlocutory decree will not be turned over for execution, while the appeal is pending, for the validity of the verdict too depends on the outcome of the interlocutory decree. Manifestly, if the appeal from the interlocutory decree held, the definitive decree did not, since it was pronounced by a judge whose jurisdiction had been suspended, as Panormitanus well puts it. The case is not even injured by the fact that the judge from whose interlocutory decree an appeal has been

taken may go on to take further action, until the soundness of the appeal is cleared up, [nn] as Aretinus urges in opposition, and Felynus follows him—he was his teacher—for they do not reply to the reasoning of Panormitanus, and it does not follow that an execution may also be made. An execution is different from the other measures, and goes beyond the ulterior remedies. But this is another question.

The last argument does not stand in our way, [oo] for the decision mentioned is in accordance with the law of France which does not grant the review of an interlocutory decree that causes irreparable injury. From that rule would come the rule forbidding the grant of a review in other circumstances, but a rule covering all cases would not be established. Consequently, since the arguments on the other side have been refuted, our third argument stands.

But since there are people who would take their stand mainly on the words of the laws which seem always to forbid review, let them still hear [pp] that the laws are talking of petitions, not to secure justice, but of petitions obtained by favor, by solicitation, by using elaborate means to secure a favorable decision, by the use of powerful influence. [qq] Thus a petition in the strict sense presupposes favor, and that I am not dealing with now, but I am contending for the other kind of a petition whose purpose is to secure justice, which may be called an appeal, a restoration. An appeal from an interlocutory decree pronounced even by a Prince or the senate of a Prince, is not forbidden. [rr] In a review of this sort, granted to secure justice, it
196 would seem that an execution would be delayed. Even a request for a review in this situation would delay it. [ss] Those who say there is no delay are talking of a petition granted as a favor. Perhaps under the civil law which we are following here the same principle would not apply to the delay, as is set forth by Aretinus and others with regard to canon law. [tt] Under the canon law the jurisdiction of the judge is not suspended by an appeal from an interlocutory decree. Why should it be suspended for cases which would never be finished, inasmuch as under that law it is allowable to appeal from every interlocutory decree? But under civil law, inasmuch as an appeal from an interlocutory decree may not be given, except in a very few cases, reason does not stand in the way of a stay. When an appeal is given from an interlocutory decree causing irreparable injury, reason will allow a stay, that justice may not have granted the appeal to no purpose. Why, has not an appeal been taken from the verdict which followed? Of the nullity of such a verdict have I not spoken? Consequently, execution of it will not take place. Thus I have spoken again on the sixth point urged against us.

I speak now of our same fourth argument explicitly in favor of a petition for a review, based upon Decianus and others.

[uu] Although the clause would leave one in doubt whether such an application should be accepted, "in a doubtful case the Prince ought always" to accept a petition, [xx] for although the granting of it depends on his will, still the Prince ought not to reject it, if the petition is just, and these writers are talking of the review of a verdict, of a royal verdict, indeed of a *res iudicata,* and they are talking of the justice of a law, for of the other power of the Prince, which is absolute, his power to grant a review, even when no one may petition for a review, one ought not to raise the question, as Decianus writes.

a—Contar. si de mo. po. lim. 5. n. 2. 3. 13. et q. 8. n. 23.; Menoch. 4. adip. 818. 822. et seqq.
b—Menoch. de arb. cas. 490.
c—Ang. 3. cons. 30.; Bal. alii. l. 9. qui sat. cog.
d—Fulg. d. l. 9. n. 9.
e—Bal. l. 2. n. 19. C. de episc. aud.
f—Alex. l. saepe. nu. 70. 71. de re jud.; Odd. de rest. q. 4. n. 102.
g—Rom. d. l. 9. n. 3.
h—l. 13. ubi gl. C. de procur.
i—Purp. 1. cons. 62. et 66.
k—Ceph. cons. 180. n. 29.
l—C. ut li. pe. ubi Cujac. parat. Ias. rub. Bal. l. 2.
m—Ceph. cons. 661. num. 16.
n—Mara. de app. n. 13.
o—Menoch. cons. 818. n. 40. et de arb. q. 70. n. 34.
p—Ias. l. 2. n. 7. Cast. l. 3. C. ut li. pe.; Menoch. d. 70. n. 18.
q—Menoch. d. 70. nu. 17.; Tiraq. de retr. lign. §. 8. gl. 2. n. 9. item de ju. in re. expe.
r—Ias. auth. quae supplicatio. nu. 7. C. de pr. imp. off.
s—Lancell. 2. de att. 19. n. 16.; Contar. si mo. po. q. 8. n. 40.; Gail. 1. obs. 154.
t—Rebuff. de suppl. num. 66.
u—Decia. 1. cons. 47. nu. 23. 26. 28.
x—Lancell. 2. de att. praef. nu. 631.; Saly. l. 2. n. 2. 3. C. ut li. pe.
y—Gail. 1. obs. ult.
z—Non. 123. ubi An. item gl. Cy. Bar. Alb. Bal. Saly. Ias. l. 2. C. ut li. pe.
aa—Odd. de rest. q. 7. n. 2.
bb—Odd. de rest. q. 16. n. 24. et q. 17. n. 46. 82. 89.
cc—Pan. c. 4. n. 3. de in int. rest.
dd—Rebuff. de suppl. n. 11. 70. 74.
ee—Mara. de app. n. 22.; Menoch. d. 818. n. 98 et 4. adip. n. 897.
ff—Rebuff. de lit. civ. gl. 2. n. 43.
gg—Pan. c. 38. n. 9. de testi.
hh—Mara. de app. n. 61.; Dec. c. ad haec. n. 15. de appell.; Bar. tra. de jud. susp.
ii—Menoch. d. 818. n. 9.; Rebuff. de supp. n. 87.
kk—Rebuff. de supp. n. 3. 4. 16.
ll—Ias. §. ubi decretum. n. 59. et add. no.
mm—Panor. c. 38. n. 3. de testi.
nn—Aret. Fely. d. c. 38.
oo—Rebuff. eo. art. 1. gl. 26.
pp—Cuja. nov. 113.; Alc. lib. 4. de V. S.; Bero. c. ex literis. n. 7. 18. 20. 21. et c. de rescr.
qq—Odd. de rest. q. 1. n. 7. & q. 43. n. 52.
rr—Odd. de rest. q. ult. n. 2.
ss—Lancell. 2. de att. 19. n. 16. 20. 25.; Contar. si de mo. po. q. 8. n. 40.
tt—Covar. pr. 24.
uu—Decia. d. 74. in fi.; Meno. d. 4. n. 898.
xx—Rebuff. de suppl. num. 45.

197 CHAPTER XVII

Of an Action for Possession to Cover the Retention of Property; of Canceling a Sequestration; of a Juratory Bond, and of Accepting Certain Bondsmen

That [a] one who holds possession ought not to be disturbed in his possession, both the doctors say, and it is undoubtedly the truth. [b] Likewise it is certain that disturbance results, when one cannot use his possession freely, [c] for possession means the use of a thing. [d] In like manner they say that use is interfered with by a sequestration, that hindrance and annoyance are caused to the possessor, that in fact he is robbed in a way by sequestration; [e] that, therefore, custody ought not to be granted, but that bondsmen are enough to safeguard the property, which the judge will not bring under his control on the pretext that there is danger of a very serious temptation, unless perchance proof be given of this danger. [f] Even the spreading abroad of reports is disturbing in the opinion of everybody. [g] In short, the interdict, beginning *Utrubi,* which we have interposed against them, is granted to prevent a judicial sequestration. [h] It is given against one who causes a disturbance by judicial procedure; it is given against one who causes a disturbance when he is not in possession.

Now, our adversaries clearly do not have possession; they say they have been robbed, [k] and therefore they do not have possession. We have established our right to possession, [l] since it is enough to have proved the right at the time when the suit was brought, or the disturbance made. [m] We did not have to furnish a regular proof either that we do not hold possession by violence, in a secret way, or by sufferance, [n] and we are not even forced to show title for our possession. [o] Indeed, in a doubtful case just and *bona fide* possession is taken for granted. [p] Good faith is taken for granted, at least when
198 a just title resting on purchase precedes. [q] Good faith is taken for granted even when a stolen article has been bought, since it is taken for granted that the wrong deed, the act of another, was unknown. Therefore, since our right of possession and the disturbance caused by our adversaries have been proved, what remains except [r] that our adversaries should be told that they must cease annoying us both now and in the future, and that they should be fined for the loss caused to us by annoyance in the past?

Now, our adversaries will make no objection because of the summary character of the process, for summary action has not been taken in our case, as is clear from the proceedings. [s] Still in our case, as in other actions for possession, summary action ought to have been taken, as all writers teach. They will take no exception on the score of ownership, [t] for on this point exception is not taken against this interdict, unless, and all writers hold this view in like manner, they offer proof at once, which they can in no wise do. In fact, even if they could do it, they would not be listened to, as the more commonly accepted opinion goes, which is stated by several writers, and is approved by Menochius, who may be taken as the equal of several writers in these discussions. [u] This opinion Cravetta approves so heartily as to wonder even that there have been people who could follow the opposite view; while Socinus the younger holds this view so firmly that he does not accept undisputed ownership as making an exception. Then what, pray, would follow if this exception should be allowed? Still there is as yet no dictum about it; so far is it from being recognized. [x] Even if the matter of ownership were clear, if it were not disputed too, a verdict on this question cannot be given, [y] and in our case, when it is clear about the action for possession at least, upon this subject announcement should have been made first. [z] Announcement must always be made upon an action for possession, because one would wait almost in vain for announcement about ownership. [aa] And even supposing that we had had a countersuit "for recovery" brought against us (which was not done, as it could have been), if the fact of our possession were known in advance (as it was), pronouncement on it should have come in advance; [bb] by clear proofs our adversaries would be bound to estab- 199
lish in this case the fact that they held possession, if one follows the opinion of all writers. [cc] All the principles of law in other cases make it clear that the property should be released to the possessor. [dd] Why should I mention the fact that the man who has been deprived of his property is reinstated only when he deals with the robber? He is not reinstated in dealing with a possessor who holds on bad faith, nor even in dealing with a later owner who holds possession from the thief himself. [ee] The title *Unde vi* [1] is not directed against a single one of the later owners, and this point is clear. [ff] The law *si coloni* [2] is not a remedy against a later owner, who holds a title and shows good faith. [gg] Ch. *redintegranda* [3] is not a remedy against a single one of the later owners, as (so writers maintain) the title *Unde vi* is not; it is not directed against one who has a defective claim to possession, nor against one who holds possession from such a person; nor does it apply, for instance, even when the

[1] [*Code*, 8, 4.] [2] [*Dig.*, 43, 16, 20(?).] [3] [*Decr.*, 2, 3, 1, 3-4.]

thing itself has been stolen. Menochius teaches these doctrines without hesitation, [hh] and other writers say that under the civil law no interdict may be directed against one who holds from a robber, but that all possessory remedies apply to recovering the possession of personal property only against a possessor with a clear defect in his title. Is there anything then to delay a verdict for us and the release of possession, if there is no one of those remedies which are granted to those who have been robbed that may in this case be directed against us? Even supposing that all of them were granted, since we have proved our property, and since our adversaries have not introduced other remedies, judgment concerning our property must now be given in our behalf, as I have said.

Pray, why should one hesitate about the propriety of canceling the sequestration? [ii] Sequestration is hateful; it is forbidden, so that every possessor, however forcibly he may maintain his claim, ought to be protected in his right of possession. [kk] Sequestration ought not to be employed against honorable men, who would not wish to squander property, etc. [ll] The rule is quite clear that it is canceled
200 and held in check by a bond. Even by a juratory bond, I say, it is canceled, although Jason vigorously denies this doctrine, and cites in his support Speculator, Butrius, Imola, Panormitanus, Alexander, as well as Albericus, that very experienced and trustworthy doctor, who, he says, has always seen the principle followed which he advocates. Here in like manner is the practice followed of supplanting the bond by sequestration and of not receiving it? But these arguments do not stand in the way, and I assert the opposite opinion, for the citations given above apply to a debtor under suspicion. It is clear that all the doctors mentioned above are teaching doctrines which concern a man under suspicion. Thus Jason himself on the law [mm] which deals with one under suspicion says, " and the person may be under suspicion." Furthermore, there is no doubt that those who expound a law should be interpreted according to the words of the law to which they refer. Or what point is there in discussing a matter? [nn] Thus Speculator, the leading authority of Jason, says: "But suppose Titius is in debt to me, and has no real property, and is *under suspicion,* etc." [oo] Thus Albericus says: " Likewise it inquires if money is claimed, or claimed of a debtor *under suspicion,"* etc. This is the attitude of the rest, and consequently in the case of one who is not under suspicion the opposite view is more correct, and everybody holds the opposite view. [pp] Indeed, the Imperial Chamber, following the laws and their expounders—and one may see its opinion in Gaillius and Mynsingerus—explicitly notes that a sequestration may be canceled by a juratory bond, if the person against whom it has been made be honorable, be known to lead an

upright life, be of established repute, be not under suspicion, and do not suffer from a reputation for untrustworthiness.

But if the practice of the tribunal before which we stand be urged against us, then we will say that the practice, which has opposed and stood in the way of such a bond as we have asked to have received, ought to be shown. It will in no wise be to the point that this bond has never been given or received, [qq] for a law is not nullified by the failure to apply it, but by the application of the opposite principle. Perhaps there has not been an opportunity
to ask for the admission of such a bond. Perhaps there has not been 201
a reason for admitting it. Let our adversaries prove that a request for its acceptance in a case like this one of ours has been made, and that the request has been rejected, and not once merely.

[rr] Meanwhile, this principle of law is undoubtedly correct, that the judge will decide from the evidence and the presumptions whether an oath should be tendered to the effect that bondsmen are not to be found, as Socinus writes. He also cites Baldus, Angelus, and Oldradus in support of this opinion.

Furthermore, I say that there is evidence and that there are presumptions in this case to persuade a judge that the oath should be tendered. The very dignity of the person concerned, [ss] which is regularly considered very carefully in receiving any oath, leads to this decision. [tt] Many writers in harmony with the laws observe that illustrious men are not compelled to furnish a bondsman to satisfy a judgment, but that dependence is placed on their juratory bond. [uu] An ambassador, the ambassador of a great King in particular, is not considered a person under suspicion, and therefore dependence is placed on his juratory bond, and this point many others note in explicit cases.

The very situation of a foreigner, which usually prevents him from finding bondsmen without difficulty, leads to the same decision in this case, [xx] as the doctors illustrate in the case of a foreigner. And we say "without difficulty," for the law puts it in this way, "if a bond shall have been necessary, and the defendant cannot furnish it *without difficulty,*" etc., and on the same law Jason observes, "note that well-known expression that we are said to be able to do that which we can do without difficulty and conveniently," etc. This is enough for the decision of the judge, [yy] which is determined without doubt by judicial presumptions, by the purpose of the law, and by a sense of equity. [zz] It is at the discretion of the judge to decide what can be done without difficulty, [aaa] and because it is a general principle that bondsmen are not found "without difficulty," that conclusion will surely be held in the case of a foreigner, and will be the decision of the judge. [bbb] Therefore, without doubt, as the accepted rule runs,

if he swears that he does not think that, since he is a foreigner, he can find bondsmen, this fact would be proved in this fashion.

202 Consequently, there will have been the more reason for this bond, inasmuch as bondsmen who could be found for the party concerned have been offered, for it is evident that he does not hesitate to give the bondsmen whom he can find. [ccc] "Forbearance and concession in the case of difficult acts is not difficult," is the dictum, even provided bondsmen are not found. But if these bondsmen are not accepted, who are said to have been accepted in other even more serious cases, [ddd] and if it is not taken for granted today that they are weak, and if in fact they are approved as suitable by several highly approved persons, and if even there be a suitable guarantee of their suitability; surely it is the judge himself who is now acting to prevent the party from having bondsmen. [eee] A bond is sufficient which satisfies the law and the man, or the law at least. [fff] That person is a suitable bondsman who possesses a good deal even of personal property, or has several debtors. Besides, those who are willing to guarantee the suitability of the bondsmen have real property also. No bond is suitable, if this one is not. If a party ought to be accepted on a simple juratory bond, why not on this one, when the party will swear that he cannot provide otherwise, that he cannot give other bondsmen? [ggg] A wrong will be done to the party and to the bondsmen if suitable bondsmen are not accepted.

a—Pan. c. 2. de seq. po.
b—l. 10. de vi arm.
c—Alc. de qui. pe. pr. n. 90.
d—Anch. cons. 248.; Menoch. 246.; Ro. Gen. dec. 290.
e—Menoch. cons. 696. et 3. ret. 88.; Alc. 5. cons. 132. n. 62.
f—Menoch. d. 3. nu. 294.
g—Menoch. d. 3. n. 475.
h—Menoch. d. 3. num. 297.; Corn. 1. cons. 113. n. 1.
i—Menoch. d. 3. num. 290.; Bero. c. 5. n. 39. 46. de re. sp.
k—Menoc. prael. rec. n. 21. et ult. ret. 29.
l—Covar. pr. 17. n. 3.
m—Men. d. 3. n. 600.
n—Corn. 24. cons. 313. n. 4.; Ceph. 645. n. 3.
o—Crav. cons. 901. n. 7.
p—Corn. 4. cons. 19. n. 1.
q—Corn. 2. cons. 147. n. 17.
r—Menoch. d. 3. num. 455.
s—Menoch. d. 3. num. 448.
t—Menoch. d. 3. num. 672. seqq.
u—Crav. d. 901. n. 1. et cons. 943.; Soc. ju. §. nihil comm. nu. 147. 153.
x—Dec. cons. 84. col. 3.
y—Soc. ju. d. §. num. 381. seqq.; Alc. 5. cons. 69.
z—Bero. c. 1. n. 37. de rest. spol.
aa—Panor. c. 19. nu. 24. de praescr.
bb—Menoch. cons. 701. num. 3.
cc—Corn. 4. cons. 313. num. 4.
dd—Corn. 1. cons. 329. n. 7.; Bero. d. c. 1. n. 10.
ee—Menoch. 1. recup. 150.
ff—Menoch. 10. recup. 17. 18.
gg—Menoch. 15. recup. 66. 72. 76. 77. 79.

hh—Rip. l. rem, quae. n. 23. de adq. poss.
ii—Paris. 1. cons. 41. n. 17.; Ceph. 479. 681.
kk—Imo. cons. 50.
ll—Pan. d. c. 2.; Imol. d. 50. et cons. 97.; Ias. l. 7. §. 1. n. 17. qui sat. cog.; Bal. l. 16. de off. praes.
mm—l. 7. §. ult. qui sat. cog.
nn—Spec. de seq. po.
oo—Alb. d. l. 7. §. ult.
pp—Gail. 1. obs. 148.; Myns. 2. obs. 11.
qq—Fely. c. 1. de tre. et pa.
rr—Soc. d. l. 1. qui sat. cog.
ss—Menoch. de arb. c. 464.
tt—Barul. l. pe. C. de dign.
uu—Soc. c. sane. col. 2. fi. de fo. comp.
xx—Ias. l. 1. n. 23. qui sat. cog.
yy—Menoch. de arb. q. 6. 13. 14. etc.
zz—Menoch. de arb. c. 205.
aaa—Rip. de pac. 2. cons. 15.
bbb—Clar. §. fi. q. 46.
ccc—Cuja. c. pe. de don. int. vi. et uxo.
ddd—Alc. 2. praes. 27.
eee—Bal. c. 7. de jurejur.
fff—Ias. l. 2. l. 5. §. 1. qui sat. cog.; Alex. 2. cons. 37.
ggg—Soc. Ias. d. l. 5. §. 1.

CHAPTER XVIII

On Not Appealing from a Decision Given in a Suit for Possession

Every [a] suit for possession relates to the moment, that is, it
203 deals with a temporary state of affairs. Every interdict, every action for possession is said to relate to the moment. This is the view of Cujacius and others, although certain authorities, [b] as Menochius reports, maintain that only that suit for possession which is briefest and out of the ordinary should properly be called "momentary." And yet the common interpretation of the word (*momentarius*) as "soon recoverable in another court" excludes no suit for possession, and Cynus in treating of the means for retaining or acquiring possession says that there is no doubt on this point. And it is not doubtful here if we are willing to follow the most commonly accepted view.

The difficult question follows, whether an appeal should be denied even so far as it relates to devolution, [c] for Bartolus seems to deny the correctness of the refusal, and with him are many others who maintain there is devolution. And this opinion, as they say, is held in Spain, France, and Germany, and it was always observed in the Council of Naples, and it is more commonly held, etc. And yet there are many who testify that the contrary is the common view, or rather the more common, and indeed they show this by citing very many authorities. [d] The truer, more widely held view, the view more accepted in the practice of the Curiae is that it does not devolve. This is the view of Bartolus too in his passage [on the subject] and he does not take a different view in any other passage, no matter what may be believed of him to the contrary, as Contardus writes. This was the view of all the ancients and the commentators before Bartolus; [e] and concerning their preëminent authority there is nothing for me to say, because everyone knows they are above the authority of Bartolus. But then, too, many more even afterwards took their stand against that view which is called the view of Bartolus; for instance, Baldus, Salycetus, Fulgosius, Comanus, Romanus, Imola, Castrensis, Jason, Decius, and others. Of them Contardus makes the same statement and he speaks also of the shifting about on the part of others who at one time appeared to accept the opinion of Bartolus just mentioned. [f] Thus, since it is a question of fact, as to what the common view is, [g] and since we do not believe him who
204 talks of the common view but rather him who shows what is the

common view, this view which we mention would be the common one.

Furthermore, as to a suspended judgment, the doctors agree that it is irregular to grant it in a suit for possession. Now, our opponents in this investigation have recourse to the question of limitations in the following way: They assert—what is perfectly true—that suspensory action is taken where the loss is not recoverable in a suit for ownership, [h] as others neatly explain through another suit for possession. Moreover, my opponents go on to make mention of the irreparable loss suffered by a sailor who merely has the power of detention and is now deprived of that by an [adverse] decision, [i] and yet in a suit relating to detention the rule is explicitly laid down that an appeal to suspend the judgment should be granted, but I reply that the loss here is always reparable or else it is not loss. Look! Either it is of his own loss on account of passage money that the sailor speaks—but this passage money has been assigned to him so that if he accepts it as being a fair amount, then he suffers no loss; or, on the other hand, if he does not accept it, thinking it not a fair amount, he will recover the loss suffered by an hypothecary action, [k] by an *actio in rem,* by a suit to secure ownership. [l] Thus also in a suit involving detention the appeal is denied should the loss be reparable. Or else the sailor speaks of loss because he fears the action his employers may take against him, because property intrusted to him has not been defended. But here either he has no such instructions from them, so that the loss is not to be considered, because there is none, or else he has such instructions and will recover his loss by the institution of a separate suit. Or else the sailor is speaking of the loss suffered by his employers, in which case he either has no authority to make such a statement, and, therefore, will not be heard, or else he has the power, and will in like manner recover the loss for them.

Then they dare to make a point of the possession of very valuable property, saying that here lies the cause of no ordinary prejudice; [m] but they fail to recognize that a suit for possession always involves merely ordinary prejudice, even though the possession of some great advantage be involved, even though the property possessed be of the highest value. Then, too, they strive to demonstrate 205
the irreparable nature of the loss because, forsooth, an ambassador is the more powerful personage, adding that he is more powerful too by reason of his wealth. [n] And yet it has been the usage to call the more powerful, not him who is wealthier, but rather him who by virtue of his high office can show the other man a favor involving a threat. Contardus, who here measures power by wealth, leaves the matter to the decision of the judge. Why now, I pray, is the Spanish

ambassador more powerful here where the ambassador of the federated provinces of Belgium stands on the other side?

And then does not even Contardus himself give the opinion that this exception is void if a satisfactory bond is given, as must now be done. [o] The same reply was given by the Council of the Emperor, and also by the Council of Ticinum, of Padua, and of Bologna, as may be seen in Menochius on the Finariensian case.

[p] Further, Menochius himself does not object strongly where the security is sufficient, and surely he will not single-handed have much weight against so many learned authorities and colleges. "He is defending all by himself a strange proposition that is far removed from the view of others." In that case Menochius is speaking of himself, and in the preface to those "Replies." If the Spanish ambassador loses his case afterwards in another court, there is nothing to prevent his being forced to bow to the decision; at least they who are given as bondsmen must accept it. There is no question here of the possession of a strongly fortified citadel such as there is in the case of Contardus and others, and the giving of security always removes that exception.

They bring forward another objection, namely, that in this case the question of ownership is involved and connected with the issue. But how is the question involved here? [q] They equivocate in alleging that it is involved, not understanding the words of learned authorities on the question. We have no confusion of issues, even though the question of possession and the question of ownership are before the one and same court at the same time. Things are said to be inseparably related only when the principle applying to the one cannot
206 be divorced from that applying to the other. Such are the examples noted in this connection, and such is the treatment of real equivocation by my learned friend, Eugenius, but there is no parallel in this case.

Then with reference to the equivocal assertion that there is a confusion of issues [r] here, the conclusion of the libel should be examined that it may appear whether a suit for possession alone is held in view; but neither in the conclusion nor in any other part of the document is anything mentioned which necessarily brings in a suit for ownership. [s] Neither the word "property" nor the word "consider" which we employed [carries any such implication]. We sought to have possession made free for us, we did not use the expression —which is believed to form the conclusion in an application for ownership—"that it be freely released." We sought to have the possession freed, that is, merely released, made free from the seizure under which it now lies. [t] Then, too (even though the suits for possession and for ownership had been before the court at the same

time), we should have regard for the decision which, as ours did, suspends judgment in the suit for ownership.

Again, our opponents read us a different decision [on the point] whether, where questions are entangled, appeal should be taken from the whole decision, that is, from that part of it as well which bears on the suit for possession—I mean where the questions are entangled in the sense that they are here, or where they may be so called by equivocation. [u] Appeal is taken always from the part of the decision that touches the question of ownership, not from that part which touches the question of possession, as my learned authority explains here with great learning and at great length. [x] This is the view of it taken by Menochius in cases where the two questions can be separated, because in such cases the useful cannot be vitiated by the useless; and, consequently, as Cynus says, no change with reference to a suit for possession is ever found. So much for these cases.

But my opponents will lend ear to another who says that the decision is clearly unjust, [y] that one may appeal from such a decision, because an evident injustice is like a nullity. Then, too, they speak of a nullity, [z] and of a nullity too one may speak here, [aa] but, as Menochius and others write, from the action taken also we should be perfectly clear on these points. Now, I have, I confess, considered just what sort of injustice of this character could exist here, but have found none.

Furthermore, the judge may pass over the other points which are not involved in the action under consideration; the proofs may be 207
heard by the judge in camera; the judge may pass from the replies of the defendant to his own interrogations. So Contardus explains it. [bb] The whole subject-matter of the proofs lies at the disposal of the judge. Thus there is no injustice which is evident, none which is palpable, as they say. Then, too, in regard to the nullity which they mention, I took under consideration [cc] what Baldus has in his "Replies," namely, that if the libel involved also a question of ownership (as it does not in this case), and the judge (as he does here) should confine his pronouncement to the question of possession, then the decision would be null, because not in keeping with the writ nor given on the points involved in the suit. And, Baldus goes on to say, it makes no difference if the judge reserves his decision on the question of ownership, because this reservation is a sort of precaution taken by the judge and an embarrassing of the suit. So much for the question of nullity.

But, on the other hand, no matter how the action in the suit for ownership was taken, the judge should have pronounced on it also; still, if by any chance he has not done so, his decision will not on that account be void, no matter what Baldus may have said.

[dd] Against this view of his, stand Castrensis, Corneus, Cravetta, Contardus, Socinus, and Eugenius. Their view is the more correct, even though Berojus and Gratus be cited along with Baldus; for suppose that the one question had arisen first. [ee] Then a pronouncement might have been made on it alone, as Ancharanus and others assert. Therefore, Baldus should not qualify his statement when the question of ownership has been raised at the same time. Consequently, there is no occasion here for admitting an appeal. Now, no one shall say that any doubtful point lies here to justify an appeal, [ff] saying that in case of doubt a nullity should be admitted and the question should be admitted to an appeal. [They would be wrong] [gg] for there is no doubt, when common opinions support the stand taken. And as to the duty of taking an appeal on the question in case of doubt, there is none when we have a negative rule which forbids the taking of an appeal, just as there is a rule here that no appeal be allowed in a suit
208 for possession. [hh] This is the view of Decius precisely on this point and of Berojus also. And Decius is followed on this point by Alciatus in his "Replies," and in his "Lectures" he had said that this same thing was conclusively proved from Panormitanus, although the latter would nevertheless consider it a safer course to admit an appeal even where there is a negative rule. Molinaeus too would follow this procedure in his supplement to Decius. This same view, opposed to that of Decius, is followed by Contardus, who also handles the question, and he speaks of others besides himself in support of the same view. However, he adds others too in support of Decius, to wit, Baldus and Nevizanus.

[ii] Let us examine the statements of Contardus, who supports at some length what I may call the affirmative. The reason, he says, why an appeal should be taken in a doubtful case is that the very term (*appellatio*) carries the presumption that an appeal (*appellatio*) may be introduced, and the principle applies just the same when the taking of an appeal has been duly forbidden. Appeal is a beneficent thing, for which presumption should count more than it does for a verdict. He goes on to say that in a doubtful case we should have regard to that which prejudices less, and the admission of an appeal would prejudice less. The principle that involves the less prejudice here and the greater equity he calls the soundest one. He adds that in a doubtful case we should the rather presume that the decision was given with reference to continuous than temporary possession. So much for Contardus.

Now we reply to the first point, that on the contrary the presumption is not made in favor of the appellant when the appeal is interposed in violation of the rule of the law. Nor do we summon others to our help here where Contardus himself makes this distinc-

tion in order to harmonize opinions; because, when the appeal is against the form of the common law, it should not be admitted in a doubtful case, and thus the former view would have the right of way; but if a reason should be added for the special granting of an appeal, then appeal should be allowed and the latter opinion would have 209
the right of way. This is the distinction which former writers would not deny, nor do we deny it. But our question belongs to the former case.

In reply to the second point, regarding less prejudice, we say that it is a vicious statement in the present question because not even trifling prejudice is caused by the victor, or if there was any, still what the statutes and common law give him should not be taken from him for the simple reason that it harms the other party or causes him greater prejudice. [kk] He does not cause an injury who is exercising his own rights.

As to the third and last argument of Contardus, I may say in the first place that every question or action concerning possession is, and is regarded by the law as, of a provisional nature, as was set forth above at the beginning, and that this distinction between continuous and temporary possession is not found anywhere, and especially not in this case of ours. Again, my opponents should give proof that they are not presuming that a decision was given other than that regarding possession and the case of the moment; for we simply brought a suit for possession; their own decision awarded us the possession. Now, every action for possession relates to the present moment, as already said, and [ll] the decision is understood to be in harmony with the libel and is issued in harmony with the libel. Further, the intention of the judge in giving his decision was, as all understood it, [mm] to have it in harmony with the libel, in accordance with which it has to be interpreted, so that the action may stand and not perish. This is the more to be approved because that whole remedy of devolution, which they derive from the ingenuity of the doctors, has not been introduced in accordance with the law or the statutes, and, consequently, in cases and remedies that relate to possession above all other cases there should be the least place for it, especially where the decision given dealt with the suit for possession alone, and does not involve in addition a suit for ownership, as mentioned above, nor one for securing the income 210
therefrom, [nn] in which case, again, the doctors commonly think that an appeal from the decision in the suit for possession should be granted, just as it should in the case of a suit for possession involving the question of ownership.

a—Cuja. C. si de mo. poss. et 1. obs. 20. et l. 14. C. de agr. cens.; Decia cons. 28. et ibi add. gl. l. C. qui leg. pers. st. in jud. hab.

b—Menoch. prael. rec. 32.
c—Contar. C. si de mo. pos. in. intell.
d—Eug. cons. 71. num. 23.
e—Menoch. cons. 84.; Alex. 4. cons. 55.; Anch. 136.
f—Decia. cons. 259.
g—Crav. cons. 166.
h—Contar. eod. lim. 1. num. 105.; Decia. 4. cons. 67.
i—Bal. alii. C. si de mo. pos.
k—Bal. ibid. n. 9.; Menoch. 3. adip. 11.
l—Cont. eod. lim. 21.
m—Decia. cons. 28.; Ias. rep. l. admonendi. n. 273.
n—Bart. Bal. Ang. Ias. l. 1. C. ne li. po.; Menoch. cons. 38.
o—Resp. Caes. n. 53. 60.; resp. 1. Tic. n. 37. resp. 2. n. 28.; resp. Pat. n. 17.; resp. Bon. fi.
p—Menoch. resp. Finar. art. 3. n. 31. quod in vol. 1. cons. 2. n. 214.
q—Eug. cons. 70. n. 11. et cons. 71. n. 9.; Menoch. de arb. ca. 95.
r—Dec. d. 28.; Decia. 1. cons. 46. n. 5.; Eug. d. 71. n. 33.
s—Soc. l. rem, quae. n. 6. 14. de adq. poss.
t—Contar. lim. 2. §. 5. num. 14.
u—Eug. d. 71. n. 30. seqq.
x—Menoch. 9. recup. 325. fi.
y—Menoch. 4. adip. 850.
z—Bal. Saly. C. si de mo. poss.; Alc. 6. cons. 37. num. 16.
aa—Contar. lim. 9. n. 19. 35. 50. 54.
bb—Decia. cons. 448. 510. 596. 652.; Menoch. de arb. ca. 90. et 1. praes. 79.
cc—Bal. 1. cons. 153.
dd—Eug. d. 70. n. 20. et cons. 72. n. 20. 21. 24.; Contar. lim. 2. §. 5. num. 21.
ee—Anch. c. 2. de ca. po. & pr.; Ceph. cons. 187. n. 34.
ff—Dec. l. quotiens. de reg. ju.; Villagut decis. 5.; Menoch. cons. 415.
gg—Decia. 1. cons. 2. n. 76. vol. 2. cons. 70. n. 14. vol. 3. cons. 111. n. 17.
hh—Dec. d. 28.; Bero. c. super. eo. il. 2. n. 2. de app.; Alc. 6. cons. 44. et c. 1. n. 116. de off. ord.
ii—Contar lim. 27.
kk—l. injuriarum. §. 1. ff. de injur.; l. 3. §. is tamen. ff. de lib. ho.; l. nullus videtur. ff. de reg. jur.
ll—l. ut fundus. ff. commun. div.; l. ult. C. de fideic. lib.
mm—gl. l. si quis. ad exhibendum.; gl. in c. si per confirmationem. de elect. lib. 6.
nn—DD. in l. 1. C. si de poss. mom.; Ang. cons. 46. statuto.; Decia. cons. 45. num. 25. v. 1.

CHAPTER XIX

Of Definiteness of Price in Buying, and of a Permanent Trustee for One's Own Property

Peter sold and made over to Philip certain revenues which were to be his in the House of Saint George at Genoa; but now that they have become his, he is unwilling that this contract should be kept; and it seems that he is within his rights in taking this position. [a] No sale can stand which does not have a definite price, and there is no definite price unless a quantity of something is stated and defined. [b] A thing is definite when the quantity of it is indicated; and this has not been done in this case where it is merely said that the contract was entered into "in consideration of a certain sufficient sum, etc." [c] A price is not definite even though it has been described as "fair," therefore, neither is it definite when it is described as sufficient. [d] Of course, it is the custom to estimate prices in the case of purchases according to the desire of the parties to the contract and not according to the value of the articles themselves; and, consequently, the contracting parties are allowed to deceive themselves in that connection l. *in causae* 2, § *idem Pomponius, ff., De minoribus*).[1] Then, too, when Philip said that he was appointed receiver and trustee for his own property permanently—as it is in the instrument—and, therefore, could institute proceedings to recover those revenues, the defense would lie ready to Peter's hand that he could recall that order, no matter what might be said about its permanent nature, even though made under oath and with a penalty attached. [e] Such is the 211
common opinion of the doctors. These and other considerations of the same sort favor Peter.

But, again, we have against him the consideration [f] that nothing is so in keeping with the trust which men should have in one another, as that decisions once taken should be adhered to always. [g] Nothing is so natural and in consonance with equity as giving effect to the intention of the man who wishes to make a transfer to another. Another point against Peter is made by the rule [h] that a person may give over even future and conditional rights and alienate revenues on any other pretext. And therefore Peter, who could alienate those future revenues and has so alienated them, should now adhere to his decision. Peter is the usufructuary, [i] and the usufructuary can sell, grant, or donate the usufruct.

[1] [*Dig.*, 4, 4, 16, 4.]

These considerations I regard as sufficient where the case is clear; for what I brought forward with reference to an indefinite price, namely that a sale is not recognized in this case, holds good if the price is indefinite absolutely; [k] for what is definite in reality, even though it is indefinite to us, is sufficient. The price is definite if we should find the words, "At what price you bought." Accordingly, here too the price is definite when mention has been made of a sufficient sum received. That price is definite which is to be fixed by someone's valuation in the future; so that the price in this case is all the more definite because it has already been named. [l] That price is definite which is such through reference to something else. [m] Then, too, it is definite even when reference has been made to a fair price, since it must be so declared in the judgment of a good man, in which there can be no indefiniteness. However, we are not here bound to consider whether there is no sale in this case; for at least there is a transfer, which needs no price. [n] There will always be contracts where no price is named.

But the second argument regarding the revocation of the trusteeship does not affect my position, because there is more truth in the view that the trustee who has received a permanent appointment cannot be removed. [o] This is verily the view of Felynus, and, finally, this is the position taken by Baldus, [p] and this was the defense offered
212 by Albericus, and he says that he won his case. And whatever may be true with reference to another trustee, [q] it is certainly true with reference to a trustee of his own property that he cannot be removed, and most certainly true with reference to the transference of rights; [r] undoubtedly so, if Philip ordered the House of St. George not to make the payments in favor of Peter. And yet we have, I admit, to deal with that one case which alone is made an exception by the laws of that House, for they make the revenues payable to their owner always, and provide that they shall not be touched by anyone else, "except in the one and only case, to wit, where and when it is evident that this is done in accordance with the express wish of the heirs." Manifestly we find here expressed the intention of Peter who is not only the heir of those revenues, but is able to dispose of them "as he may wish," in accordance with the terms of their establishment, and that expressly stated, not merely in accordance with the common law, as I said before.

To this I add [s] that if the prohibition of alienation is prejudicial and to be confined within narrow bounds, etc., how much the more should it not be introduced? Those words, once applied to these usufructuaries, "that they can receive yearly the revenues from the places mentioned," do not involve prohibition of an alienation made so long before, but they show that these parties are the usufructuaries,

not the owners of the places, and likewise they give the method of deriving the usufruct. Words, when they can have another meaning, will not signify prohibition of alienation. What if the prohibition had even been made without cause? What if it had been made in favor of the usufructuaries themselves? That prohibition does not hold. It can be disregarded in favor of my client.

a—§. pretium. Inst. de emp. ubi Hoto; item Cuja. l. 43. de V. O.
b—l. 6. si cert. pet.
c—Alex. ad Bar. l. 7. de contra. empt.
d—Ias. Soc. ju. l. 115. de V. O.
e—Bar. l. 12. de preca.; Bal. l. 4. de procur.; Ang. Imo. l. 95. de solut.; Alex. 5. cons. 29.; Dec. 475. et c. ad nostram. de conf. uti.
f—l. 1. de pact.
g—Floria. l. 4. §. 1. de aleat.
h—l. 43. 55. 73. ad l. Falc.; l. 17. 19. de hered. vel act. vend.; Bal. l. 3. C. de donat.
i—Inst. de usu, & hab.
k—l. 7. de contrah. emp. ubi Bald. et Salyc.
l—Menoch. cons. 93.; Hot. d. §. pretium.
m—Fulg. d. l. 7.; Ceph. cons. 10.
n—Ias. d. l. 115.
o—Felyn. Bal. c. 33. de rescript.
p—Alb. l. 65. de proc.
q—Bal. l. 1. l. 25. de procur.; Ang. d. l. 25. et l. 8. qui. mo. pi. vel hyp. sol.; Castr. l. 18. de compen.; Rom. l. ult. de donat.
r—l. 3. C. de novat.
s—Soc. jun. §. divi.

CHAPTER XX

Of the Sale of Perishable Goods

The request made by the illustrious Lord, who is in possession
213 of the sugar, that permission be granted him to sell it, has a certain justification, because perishable goods ought to be sold, and sugar is a commodity of this sort. [a] Those goods are called perishable which cannot be kept by mere keeping, that is, those from which no profit is derived by the keeping while they themselves are being kept. Those goods are called perishable which cannot be kept in their natural excellence "beyond three years" without being spoiled by the lapse of time and becoming worse. [b] We offset these two things in this way, namely, those goods which can be kept without great inconvenience, and, secondly, those goods which it is advantageous to sell at the earliest possible time. Under this head fall fruit, oil, wine, grain, and similar articles about which the doctors have expressed these views in common, and of which they have given illustrations. Accordingly, it would be necessary to come to the same conclusion regarding sugar, which is not only a perishable product, but would deteriorate with keeping, as experts have testified in the matter. [c] Articles of this kind ought to be sold, to use the words of the doctors in this connection.

Now, in our case there is nothing uncertain. In their case there would be the question, who has to do with the selling, while here undeniable right seems to favor his Lordship. [d] The man who is in possession for the purpose of preserving a thing is the one who sells things of this sort. Therefore, he too who has some similar claim to possession will also effect the sale. [e] That man has the sole tenure, and our client certainly does not have less. [f] Further, that case and ours seem to be marked as on a par with reference to the question whether perishable goods should be sold, whence too one would not be wrong in inferring that they are also on a par with reference to this question, who has to do the selling. [g] But note the observation of the Imperial Privy Council, where the civil law is followed, as it is here before the bar of the Admiralty. This observation is to the effect that goods of this sort should be sold by the man who is holding them. And thus there can be no lengthy question here either.

However, there succeeds another question, namely, *how* those goods should be sold. Undoubtedly at as high a price as possible,

as that observation also notes. But what will this be? [h] The price 214
at which they are "commonly" sold, as the doctors say with reference to things of this sort. I should think that the valuation already made ought to be followed and that we should be given the privilege of selling according to that valuation; for if the valuation were now less, the opposing side would wish this charged to us; they would wish to have no diminution from that price made them, and, accordingly, [the other] side would not wish to have the valuation changed, if it should be unwilling to have the valuation made less, since it has no right either to seek or desire *that,* the opposite of which it would not seek or desire if the positions were reversed.

Then, too, this question would be as follows: There can be no question there if the sum paid for the goods is in duty bound to be sequestrated; for the observation mentioned above, of the Privy Council, leaves this sum to the vendor himself, and the same principle applies here, because either we shall keep the amount paid, or the possession or tenure of the goods, which we have, will be taken from us or at least disturbed, and yet that should not be done. Therefore, we shall hold the price just as we hold the goods, whose place the price will take and in whose place it will be substituted. Either this will be done, or the goods will not be sold, but will be left—which should in no wise be done—to destruction. Consequently, there is no question here.

Or will there be the question of appointing new bondsmen to pledge themselves to guard and return the sum paid? I should not think this either, [i] because those appointed before still remain, since the reason for their final obligation remains, since their obligation is not increased, and it makes no difference to them personally. Accordingly, [k] if the security stands, even without a decree of the President, goods of this sort may be alienated. Then, too, you may think that the security stands if one side does not agree to this sale. In that case the bond will not be called one that is "renewed."

a—Ias. l. 1. §. fuit. n. 31. 33. ad Treb.

b—l. 5. de ju. delib.; l. is, cui. §. qui legatorum. ut in poss. leg.; l. ult. de req. re. ubi Bar.

c—Bar. l. interesse. de adq. poss.

d—d. l. is, cui.

e—Bar. d. l. ult.

f—Pan. c. 2. de seq. po.

g—Gail. 1. obs. 148.

h—Acc. Bart. Fulg. l. 14. de cond. fur.

i—Ias. l. lecta. n. 9.; Decia. n. 13.; Decia. 1. cons. 11. num. 29.; Ceph. 331. n. 23. 27. et cons. 603. n. 36.; Bertr. cons. 188. vol. 1. p. 2.

k—Alb. l. 5. de petit. her.

215 CHAPTER XXI

Of the Same Matter

TO HIS WORSHIP, THE JUDGE

I said that permission should be given to sell the sugar, because it cannot be preserved in its natural excellence beyond three years. What need have we here of witnesses, when we have the plain statement of the laws and of all the commentators? It cannot be kept beyond three years, and it should be possible to keep it beyond three years to prevent this permission from being given. Thus everyone says, " beyond three years." Up to three years would not be enough. But let me say, your Worship, that that which does not keep beyond three years deteriorates even after one day, for the disintegration sets in gradually, just as forgetfulness sets in gradually (forgetfulness is a sort of disintegration), and what is not found in the memory after a year is less in amount even after one day, Augustine wisely says. Accordingly, sugar becomes worse day by day if it is kept, not merely month by month and year by year, and, consequently, this privilege should be granted.

And further, there should be no anxious and exact care about the method of selling, if there is always the same result, namely, that it is sold at as high a price as possible. A valuation reveals this fair price. It may be made by the judge, by experts, or by public auction, not by public auction alone, as the opposing side would like to have it here. But the doctors note other methods too of a similar kind. Besides, according to those commentators, public auction is not without its own perils and frauds. The ambassador shrinks from a public auction, because a certain amount of disgrace would, so it seems, be brought upon him and upon the owners of the sugar by a public auction and the voice of the auctioneer. What honorable and respectable man sells his property in this way? The
216 ambassador shrinks from a public auction and seeks to have permission to sell granted him, not to have the necessity of selling imposed upon him, not to be hurried into selling straightway or into having immediate recourse to a public auction. He wishes to sell to recoup himself for necessary expenses on the wares themselves, for duty and for various other things. He shrinks now from a public auction, because he does not wish or think it fair to have to give up the valuation already made. For the valuation he is responsible to the opposing side. There is no thought of change. Upon the real owners

and their concerns, what third person should thrust himself in behalf of the rights of a third!

'Tis a sufficient reply to the opposing side to say that an ambassador has a free house, as the proverbial saying is among the jurists. I add—which is, however, superfluous—that the authority of the ambassador, which is the authority of his sovereign, extends also to the cases of private individuals, if the authority of their sovereign extends so far. Further, those who write about the ambassador or embassies, do not fail to write this warning, that an ambassador should always help the friends of his sovereign with all his energy and all his attention. The more, therefore, will they say that he should assist the subjects of his sovereign, and do we not see that all ambassadors have a great deal to do with these suits of private individuals? Then, too, those writers maintain that the ambassador should be believed when he tells what is in the contract; and they certainly write the truth with reference to these less important, probable, and ordinary matters. But, as I said, these cases abound where the ambassador has to deal with other litigants than those who have to enter suit regarding a contract.

The opposing side has nothing here to contradict. The price estimated is even more than a fair one, because the ownership of the sugar is contested and, therefore, of so much the less value. This is the view given by the doctors. Had the valuators taken this into consideration, or rather been bound to take it into consideration, they certainly would have made their valuation lower. Then has not the fullest consideration been given to the interests of the opposing side? If it wins the case, it will receive double that valuation, if 217
the property itself cannot be restored. Such is the bond. Consequently, his Worship, the judge, sees how unreasonable our opponents are. They wish the ambassador to lose his rights, or themselves the property, forsooth, just like the woman who said to Solomon, "Let it be neither mine, nor hers." Do you play the part of Solomon, your Worship. Do not let the stuff be spoiled. Put an end to these and all other delays. Besides, there will be no opportunity here for an appeal against your decision, where we have to deal with goods that will deteriorate and be ruined through delay. The interests of the opposing side have been safeguarded more than sufficiently. There may be an appeal taken in other cases, but not here. In other cases the valuation would not necessarily be accepted in the award, but it would be accepted here where it was made by the representatives of the parties concerned and, tacitly, at least, approved. Here it should be accepted in the award in order that goods which suffer from delay may not be subject thereto. Such are my arguments, apart from any proofs that may be advanced by a man learned in all the branches, and after other proofs given yesterday.

CHAPTER XXII

A Letter to a Theologian, a Legate of the Church, Urges That the Contested Property Be Sold

If I were able to come myself, I should not be writing this letter to you; for letters do not make answer if any exception is taken in favor of the other side; while I myself should make reply, if I were saying anything in your presence and it did not in your clear judgment seem sufficiently well grounded. But it so happens that I am forced to stay at home owing to ill health. You, therefore, in your kindness will read and with your learning will examine my view,
218 which I am writing or rather dictating, on the former chapter (since there is agreement regarding the latter) with reference to holding a sale.

A useful thing is the conservation of the good on hand, or the securing of the good not on hand, or the warding off or prevention of the evil, as Aristotle, or someone else, the author of the "Rhetoric for Alexander," teaches. Now, selling, which is the subject in question, conserves to us the good at hand and wards off coming ills, as I for my part think, and I think that I do not think badly. You, however,—pray, let me say it—will decide by far the most wisely. The judge's decision was that the ambassador not only was in possession of the goods, but should be kept in possession of them. Now, if my opponents—I speak the literal truth—should bring an action for recovery, by this same action, they will in a short space of time, in three days or three hours be restored to possession.

We have won many things so far in this case by good fortune, or perhaps through the culpable negligence of our opponent, even because he did not urge making a new valuation, to give rise to fresh delays, as he might have done most neatly,[1] either on the ground that a valuation never becomes an award, or because, having been made previously, it was made for another purpose. Then, too, he does not insist upon the accepting of new bondsmen, as he might very well have done, for those appointed formerly, when the property was not to be bartered off, are not held to their bond now that the sale of the property has been made permissible by the award of the judge. Then, too, he might have appealed from this award, since the aforesaid action for recovery was to follow in a short time and, in conse-

[1] [See MENOCHIUS, On acquiring possession of property, §. 5, no. 166.]

quence of this, would have sufficiently met the danger of the loss of property, even if it were not perishable produce, and if this action for recovery is not mentioned, either I am ignorant of all law, or else the opposing advocates know nothing of any part of it. I proceed. If they should omit every argument whatsoever for possession, and make their contention on the ownership of the goods, of 219
course certain victory does not await them, but still we are drawn into a doubtful and uncertain battle. I should make bold to support the contention that the contested goods are not ours, but belong rather to our opponents; scarcely in the least degree are they ours. For what did I prove once in a certain lengthy reply of mine, except that it can be regarded as utterly false that the Spaniards here have the right of postliminium? What did I establish when I showed that captured Spanish property cannot be brought either into the territory or through the territory of our King? I tried to draw the conclusion which may be thought illogical, namely, that, therefore, the property so brought is freed. And what weight shall be placed upon the third argument, that this same property, though captured and possessed for days and months, has nevertheless not been acquired by the captors until it has been brought entirely within the fortifications of the captors? I once set these arguments before Taxius, not, as now, on account of some other case, but because they were correct, and they are correct now, I tell you, but correct they will not be, however, if this sale is proceeded with. Undoubtedly the sale will make the wares something else than they are now, and, therefore, there will be no suit for recovery, no suit to assert ownership. Perhaps a personal action will be left open to the Dutch, now that the more convenient real action has been lost. And so I might add more points which would show that through a sale the goods at hand are saved to us and future evils are warded off. These considerations, which are the more weighty, I give to your ear, but still those are not to be despised either which I set down for the judge, which I urged against my opponents regarding goods that become spoiled with the passing of the hours, the considerations which the distinguished Doctor Taylor advanced in regard to the fluctuating price of articles, and the other arguments of that sort. Those wares may be sold.

And why, then, should they not be sold? An honorable and fair price for them can now be received, and why, then, should they not be retailed at the present time? Philosophers teach that a fair 220
price is not a fixed point, but may vary somewhat. Do I say, "the philosophers"? All the jurists and all theologians hold the same view. The theologians give this further warning that one should not look back or wait in the hope of securing more than a fair gain

in the future. But here I stop, either because I think I have given sufficient proof that the wares should now be offered for sale—the question put in your first chapter—or because I think that with you I have transgressed the limits of modesty in that I wish to argue on theology with you, a learned theologian. Pardon a body not now in good health and a mind perhaps embarrassed in this matter and flattering itself. Do you decide. Farewell! Love me in return.

So much for yesterday; just these points this morning. The danger in delay is of the slightest. If the other side should want a new valuation made, it will gain its request easily through the law, and bring longer delays upon us and stir up fresh troubles. If it should desire that we appoint new bondsmen to guarantee the return of the price, and that the goods be not retailed before they are appointed, it will necessarily be heard.

My Lord, thus I might point out considerations to prove the utility of a sale today. But it would be useless to add proofs for this matter already proved more than enough, especially for a wise man, such as you are, for whom, according to the proverb, a word is enough. I shall add, however, that generalization of Aristotle: As a general rule, the opposite of what our enemies want is clearly the more advantageous. But our enemies do not want the goods to be sold. Therefore it is more advantageous that the goods be sold. This is my opinion; these are my lines of reasoning which are to make you also of my opinion, even though they seem baldly put. And yet if that well-known line of action followed by Duke Albanus against the Lusitanians should not prevail single-handed against all these which I have mentioned, yet remember that our adversaries are not so formidable as to know how to make use of the opportunities
221 mentioned above. [a] But yet it is not a mark of one's wisdom to trust always in the unwisdom of his adversaries, just because Albanus once trusted with good results in that of the Lusitanians.

a—Isocr. in Orat. de pace.

CHAPTER XXIII

Of an Agreement Made in Consequence of Fear and Guile

If anything is found to have been done, it is the presumption that it was done voluntarily and not through fear, because otherwise a delict would be presumed, for the reason that the person who should use fear in accomplishing his purpose would be committing a delict. [a] This is the view, and held without qualification, too, which Alciatus gives on other cases in dealing with the rules applying to presumptions. However, the more difficult proof does not fall, as it may in other cases, upon him who wishes to prove the existence of fear in spite of that presumption of the law; for, as it is the general custom to employ fear secretly, the easier and inferential proof is enough, as we have it in the same writer and on other cases. Thus too, guile, though not presumed, is proved by inference—[b] as others also have explained at length—and by circumstantial evidence. [c] Excessive precautions prove the existence of guile, and here the precautions are of this kind. [d] Guile is proved by frequent efforts to persuade one; this likewise was the situation in the case of Pintus. To persuade is more than to compel. Thus, therefore, the reply has been made that the action was the result of guile, of a fraudulent scheme, and that a person using fraud in the way described is held for damages.

[e] Guile is presumed on the part of him who has acted through an agent and has not taken care to see the contract. And the man who had a transaction with Pintus did not take care to see under what authority the latter might act. This is especially noticeable, since he had heard too that Pintus did not have the authority to transact any business whatsoever. Let them not cast up to me the clauses of this transaction. [f] They all vanish into thin air, if guile is found; [g] and 222
they vanish if they are understood to have been drawn up with the same intent with which Pintus was induced to engage in the transaction.

a—Alc. 3. praesu. 7.
b—Menoch. cons. 118. 214. 226. 230.; Ceph. 142.
c—Ceph. cons. 718.; Alc. 3. praesu. 29.
d—Menoch. cons. 175. 406.
e—Ceph. cons. 316.
f—Ceph. cons. 210.
g—Menoch. cons. 37.

CHAPTER XXIV

Of a Decree of the Judge in a Case of Possession

A LETTER TO THE AMBASSADOR

The judge ordered that everything be sold at retail and the price divided between the two parties to be held until a more complete decision should be given. And apparently he has not dealt unfavorably with us in respect to this case of possession, for our clients, being forcibly detained, can themselves scarcely be regarded as in possession. [a] He too seems dispossessed who is in restraint, as our men were; but yet I do not say that our clients ceased to possess in the civil sense, inasmuch as they might have had the mind and natural hope of recovering, and this has been touched on in our reply. But in this action to secure possession, civil possession is not certainly taken into account; since, indeed, as soon as his Worship, the judge, has ascertained the facts in regard to the ownership, he can be forced, apart from any other consideration, to make a pronouncement on the question of ownership. [b] "If the judge has ascertained the facts regarding any matter, he will be forced to make his pronouncement," says the law. [c] And the commentators say that when he has ascertained the facts regarding the possession, at the same time as those regarding the ownership, he will even be forced by the former to make pronouncement regarding the latter also.

Now, my reply dealt with the question of ownership and regarding it I have good hope, although I see something even yet about which the judge may have his doubts. Why, pray, he will exclaim, should these goods be released, even though they cannot be held in restraint in the territory of the King? How does that follow? How does that follow for the prisoners themselves? Surely they cannot under the King's law accuse the captor, the assailant;
223 [d] for they, being enemies, may be slain with perfect right anywhere, not merely captured, if the sovereign of the territory should not forbid it. Even now let these assailants be expelled under a penalty, as Clarus [1] expresses his view with regard to thieves withdrawing from alien territory to that of Milan.

The judge will bring forward as another objection the long interval of two months, during which the freebooters held their booty

[1] §. at end of question 38, note 16, end.

in perfect security. Why, he will exclaim, do we hear in this connection so often that captured property comes under the ownership of the captors "at once," "immediately," if not even two months would be enough? The doctors investigate and dispute regarding the day in connection with the clauses dealing with this question. Therefore, they are not likely to dispute about months. Now, their discussion about fortified lines bears upon the question of the certainty that the booty has been secured. Accordingly, where there is that certainty, there would be no need of the statement, "within the fortified lines." These and other statements the judge will perhaps make. But a reply has been made to these objections and will be made [again], if they are repeated.

The judge will not say, [e] I know, that the facts regarding ownership have not been made known, that the trial was not one to establish ownership. Therefore, there will be no delay either in the decision which would have to be given, even if the suit for possession were left out, as our chief, Menochius, declares. [f] Even in a suit for possession I shall reply that the possession was retained for our clients by those of their number who were retained on board ship, though against their will, by the enemy. But still the question of unwillingness can also arise for us. Our clients surrendered and their goods were surrendered, and, therefore, they too were acquired by the enemy at the very moment when they were surrendered. [g] One who surrenders may not be slain at once, but it is not the case with one who has been captured. Goods surrendered are acquired at once, therefore, even though captured goods are not acquired at once. Let us wait. We shall overcome this difficulty also.

a—l. 1. §. pen. ubi. Ang. de vi ar.; Bal. l. 11. n. 66. C. de his qui acc. non pos.; Al. Bar. l. 3. de lib. exh.; Alb. l. 19. ex qui. ca. ma.; Imo. l. 29. de adq. pos.

b—l. 74. de jud.

c—Soc. jun. §. nihil commune.

d—Alb. 2. de ju. bel. 22.

e—Menoch. cons. 437.

f—Ias. l. 1. §. per servum, qui. nu. 4. de adq. pos.

g—Alb. 2. de ju. bel. 16.

224 ## CHAPTER XXV

What Has Been Done in a Suit for Possession

A LETTER TO THE AMBASSADOR

At first the opinion was secured, and without much difficulty, that you, your Excellency, should be in possession, and that this possession should be given to you free from sequestration as soon as you gave satisfactory bondsmen; for the objections of the opposing counsel that you, the ambassador, did not have instructions to justify your interference in the cases of private individuals were met by me in two ways. I urged that such actions also are part of the charge of ambassadors, [a] as I have indicated in my books "On Embassies," [b] and as others following me in the same work have agreed. [c] And those writers have added this fortunate statement, that an ambassador should not be forced even to show his instructions. Then, too, I replied that you, your Excellency, did not intervene here as ambassador, but as any possessor whatsoever might. [d] Of course that expedient tried by us is open to any possessory action whatsoever. And all through I took my stand upon this second reply which cut off inquiries at once.

But the other objection raised, that the opposing side had been despoiled and should receive restitution before anything else was done—this objection we pounced upon at once, and we clung to it, with tooth and nail, to support our own case; [e] for the man who says he has been despoiled, confesses at the same time that he is not already in possession; and, therefore, through the maladroitness of the other side, we gained at once what must have been long drawn out if we had had to prove in some other way that we were in possession. The opposing counsel attempted the reply that in spite of this the possession had been retained by his clients, but this was mere quibbling, because, as I said, his clients might have civil possession,
225 [f] but this would not avail against your physical possession, against your taking your stand thereon.

Strange, indeed, was the oversight of our opponents in not mentioning the nullity of the opinion or appealing against it; [g] for in either case they would have had authorities who might have seemed to be on the side of our opponents themselves. Our opponents might at least have caused us dangerous delays. But with lack of foresight they allowed the opinion to become a decision.

On other points they offered strong opposition and harassed
us greatly, and yet without sufficient judgment. They took exception
to the bondsmen whom your most Illustrious Excellency had sent
and whom the judge had accepted. Here the judge did indeed favor
them somewhat, for he not only suspended his decree concerning
the bondsmen accepted, but even revoked it, and ordered others to
be offered. As soon as other bondsmen had been produced and
the judge would have accepted them, the other side appealed to his
Majesty, alleging that these bondsmen were not satisfactory either.
The opposing side did not act wisely here, although the judge took
two days, [h] as he had the right, for deciding whether the appeal
should be allowed. The opposing side erred in making the unjust
and injurious allegation that the bondsmen were not satisfactory,
though it might have said honestly [i] that the security was not given
in a satisfactory way, since it could not have insured the restoration of a
third of the property without delay. However, since this inconven-
ience was not sufficiently provided against in my opinion even by our
representative, I should have provided against it and lent my assist-
ance by a brief exercise of authority, had there been any need. But
on this point there was deep silence.

Then, too, there was silence on the question whether the bondsmen
were effectively bound under the common law of England, as I hear
from the subtle Bernardus. [k] Further, they are not bound with enough
effectiveness to comply with the English civil law, since they were not
present and did not ratify their acceptance of the position of bonds- 226
men when finally the judge decided that an appeal should not be
admitted; for their obligation was suspended by the appeal and by
the judge's announcement that he would consider. And yet I provided
for this thing. I ordered the bondsmen to be on hand, in case they
should be called, to renew their security. But when my opponents
had appealed from the acceptance of the bondsmen and the judge
had not admitted the appeal, why had they not shown that it was
the law that the appeal should be admitted, or why did they not ap-
peal from its non-admission? They should have done this or I give
up the law. They cannot be excused. An appeal is taken from the
acceptance of bondsmen, of witnesses, etc. To my two proposals
on the other side they might so far have replied in two ways; that
the acceptance of bondsmen was not at the discretion of the judge,
and that even in these discretionary cases an appeal might be taken.

Among the many things that excited my surprise was the fact
that they proved unable to cause us trouble for a longer time, and
this was the one thing they wanted; that they did not bring forward
documents, as they might have done, to combat my documents, and
that, in one word, they did everything else. Then, too, they chal-

lenged and invited an unavoidable and serious action for damages against themselves; entirely unavoidable now owing to the fact that they gave up and kept silent on that appeal, [l] as a result of which the appeal naturally is seen to be not seriously meant. But it does not beseem you, your Excellency, to take note of these things which cannot touch you, since you occupy too high a position for the sayings of men of low degree to reach you. You have won. Do not look farther for revenge.

Farewell, and let us even express our thanks to his Worship, the judge, because he has meted out justice to us at last, and so favorably. One thing more, your Excellency. [m] The judge might have supplied what the advocates lacked. He might have followed to our disadvantage certain royal letters which he produced, and which,
227 strangely enough, are said to favor us and to have been secured by us. Here your junior advocate and likewise your agent acknowledged defeat and threw up their hands. I, however, did not yield, but took the opportunity offered by the words of the letter, and showed to the judge that they were not conclusive in the present status of the case. The judge was persuaded to our advantage, you must admit. Farewell, again and yet again, your Excellency.

a—Alb. 3. de legat. ult.
b—Paschal. de legat. c. 53.
c—Paschal. de legat. 51. 52.
d—Menoch. ret. rem. ult. num. 18.
e—Menoch. praelud. recup. n. 21. et ret. ult. n. 29.
f—Menoch. d. rem. ult. ret. num. 17.
g—Menoch. d. rem. ult. n. 52. 53. et cons. 406.
h—Ang. l. 1. §. 1. de appell.
i—Bar. l. 19. C. de ag. et cens.; Panor. c. 2. de seq. poss.; Rom. Alex. Soc. Ias. l. 7. qui sat. cog.; Viv. opi. comm.
k—Vide Alc. 8. cons. 5. n. 13.; Menoch. 212. n. 22.
l—DD. l. ult. de re jud.
m—C. ut quae des. advoc. per jud. suppl.

CHAPTER XXVI

Of the Nullity of a Decrec

Illustrious Lord:

A decision, [a] null and void, is not called a decision; it is not executed; nay, if it has been executed, the execution is to be revoked. [b] But this is null and void, in that it has a palpable error through its relation to the petition; for the petition seeks such and such boxes and the decision pronounces with regard to others. [c] A sentence given with reference to things not sought after is null and void. And the nullity will the more hinder the execution in our case, since it concerns the retention of those boxes by him from whom they are to be received. [d] "So beneficent is the right of retention that it prevails even against the execution of the decision. And retention is especially privileged," as Menochius says, following others who undoubtedly are speaking of a valid decision, so that they would certainly hold the same with reference to an invalid one.

And this argument is not weakened if one should reply that the error in this case is in the name, as it were, of the boxes and [e] that this error cannot vitiate the decision; for the answer is that such does seem to be the case, should there be really no doubt about the thing referred to, and yet there is such doubt in this case. Then, too, let
no one reply that this error can be emended by the judge, [f] because 228
no decision can be emended or corrected by the judge, even on the spot; no definitive decision, such as this one surely is, by which the whole business is defined. What then if the decision was not given in a regular manner? Regularity does not change its essence, but lack of regularity makes the act ineffectual; and, therefore, this decision is null and void, even on this score of the lack of regularity.

And let no one either begin by making a distinction for me between a regular judge and one specially appointed, as if the special appointee alone were unable to remedy the nullity of his decision: for the regular judge, though he is able to give a second decision, is not on that account able to emend a null and void decision of his. Let the same judge give a second decision, that is our request, but let him also hear us, let him suffer himself to be instructed; let him give us the opportunity of cross-questioning the witnesses of our opponents, let him see our proofs; [g] or it will be said that the decision was given in haste, and this we say in the present case of the decision

which has just been given, and, therefore,—because this is another source of the nullity—that it is null and void. [h] " The judge should examine every phase of the question by making a full inquiry, by questioning the parties repeatedly as to whether they desire anything new added, all of which the judge not only failed to do "—I use the words of Cephalus—" but on being asked was not even willing to wait for a moderate space of time," as is clear from the last acts of our agent.

Perhaps there was no reason why he should hear us, who can make some telling statements on the question of retaining the costs of the trial, of dividing the costs with the losers, of the desirability of not handing over those eight chests to the enemy, not to mention other points. Again! Have these goods been taken from the Dutch by such an expenditure of force, at such great expense, by such arduous toil, and shall all these same goods be restored to this same enemy with such utter absence of effort?

The ambassador seeks to get justice against a subject of his King. He opposes this exception to the execution of this worthless decision. That decision is of no value [i] which must be sent for execution neither
229 against the ambassador himself nor against another against whom it was not given. Illustrious Lord, I ask you again to consider this case: If a Spaniard should wish to commit a delict against the laws of his sovereign and the ambassador should request you not to allow the subject to commit the delict, would you not have to listen to the ambassador? Even should the subject not desire this, you at least have no power to permit it. Will you not at least grant the ambassador time in which to warn that subject of his King not to hand over these goods to the Dutchman? And this Dutchman, surely he has no order to recover from the ambassador of his own King. Here, too, there is nullity owing to a defect in the order, and [k] this nullity will always be urged against my opponents.

a—l. 4. §. condemnatum. ubi Iason. Rip. alii, de re jud.
b—l. 1. §. 1. quae se. si. ap. re.; Bar. Dec. alii. C. de err. calc.
c—Alex. 6. cons. 171.; Ceph. 176.
d—Menoch. cons. 110.
e—l. 4. ubi not. de leg. 1.; l. 5. §. pen. de rei vind.
f—Alex. 1. cons. 90.
g—Bologn. cons. 36.
h—Ceph. cons. 77.
i—Dec. 2. cons. 108.
k—l. 24. C. de procu.; Menoch. cons. 345.

CHAPTER XXVII

Of a Certain Exception against Execution

The agent's negligence—I am putting it mildly—led to such a decree being interposed as would never have been interposed if the agent had consulted the advocates. And yet his Worship, the judge, might have listened to what this same agent was bringing forward and was about to show to prevent the issuing of that decree. The decree is null and void for various reasons, and is certainly one from which a person would be entirely justified in appealing, most certainly one which his Worship, the judge, can deservedly recall, as Doctor Floyd, the advocate, will set forth.

I shall bring forward this point, that the case of more persons is at stake here and of many more boxes of sugar. Then neither should these eight boxes be returned to those who are asserted to be the owners, unless other owners of the remaining boxes of sugar, many more in number, have also been heard, and unless the whole case be
defined. Suppose his Worship, the judge, has decided that those eight 230
boxes belong to the claimants and suppose that they do so belong, will he decide that they should be straightway returned to these same parties? What, therefore, will become of the expenditure incurred by his Lordship, the ambassador, in this suit? What if the expenditure is equal to the value of all the merchandise? What if it is more? Or are not such cases of very frequent occurrence in lawsuits? If the expenditure is so great, the ambassador has at least managed the affair successfully in rescuing the merchandise from the enemy. The verselets of Martial apply here: "The judge makes application and so does the advocate; my view, Sextus, is that you should pay your creditor." For there are two species of gain from an enemy; the one complete, when we disadvantage him and advantage ourselves; the other half-complete, when we only disadvantage him. Let this owner of the eight chests seek an account of those expenses from his Lordship, the ambassador, and he shall receive it when there is need, when the other owners of the remaining chests are present.

The illustrious ambassador does not consider it just, and it is not just, that that one owner of a few miserable boxes should separate himself and his little bit from the rest; for if the forces of all are united, it will be easier to offer resistance to the freebooters who

have not yet disgorged this prey. What if this man should be either unwilling or unable to face a lawsuit alone, and should either come to a settlement with the freebooters or else leave a part of the property to them? The ambassador cannot submit to a procedure which would allow the enemy to acquire something. Let his Worship, the judge, hear this one point, if it pleases him: This owner of the eight boxes ought by right to lose them all, because he orders them to be handed over to the Dutchman. Such are the laws of the King of the Spains, which, the illustrious ambassador will say, should be observed against his subject. The ambassador, so far as he is concerned, I say, will acquiesce in a decree of his Worship, the judge, under which these eight chests are declared to belong to the plaintiff. He will acquiesce,
231 I say, so far as he is concerned, because he does not want the slightest thing for himself; but still he thinks that ear should be given to the remaining owners of the remaining property, the owners of the property completely spoiled, who perchance will seek a share from what is left and from this owner of the eight boxes. His Worship, the learned and experienced judge, cannot be unaware that a share should be given to those who have lost their own, in order that other people's property may be saved. It will be said that many chests have been left to those who recovered the booty from the freebooters, and, accordingly, for those boxes there will be a share given. The illustrious ambassador will acquiesce in a decree under which those eight boxes are declared to belong to the plaintiff, but it is not possible for him under the law to assent to an order that these boxes be "now" handed over "to the Dutchman."

Accordingly, he seeks from his Worship, the judge, either that the interlocutory decree be revoked, or that it be published and be suspended so far as handing over the property is concerned. The illustrious ambassador seeks to have the subjects of his own sovereign kept far from such unseemly, unjust, and most disagreeable lawsuits with himself. To think of the ambassador summoned into court without permission by the subjects of his King! To think of the ambassador doing wrong to others! To think of a suit against the ambassador, the sole author here of the action for recovery!

CHAPTER XXVIII

Of an Exception Based on Nullity

TO THE SAME PERSON

I have said that the decree which has been given to cover the
handing over of eight chests of sugar to the Dutchman is null and
void for various reasons, and I have said so in accordance with the
law. [a] Let me say that a verdict is null and void which has a mani-
fest error either in itself or in its relation to the procedure. Now, the
decree has the error that it orders chests which do not exist to be
handed over, and a decree which covers something else than has been
asked for is null and void. It covers the handing over of such 232
chests as have not been asked for. [b] A verdict pronounced with ref-
erence to things not asked for is null and void. A verdict is null
and void which has not been rendered in due form, according to the
title *De sententiis ex periculo recitandis* [1] in the Code, and this decree
has not been handed down in due form. [c] A verdict is null and
void which has been pronounced hastily; in this case our witnesses
have not been accepted, the testimony on the other side has not
been furnished to us, the judge has not been informed. In this case
the judge, as in a certain case of Cephalus, though requested by
our agent at once before the giving of the decree, was willing to
wait only a very little time, so far was he from wishing to have
the matter discussed in a full inquiry, to have parties frequently
interrogated, to have other things done, and the failure to do
these things proves the haste I speak of. That verdict is null and
void which favors the Dutchman, when he does not have a man-
date. Let the mandate be shown, if there is one, that this Dutchman
is to take legal action against the ambassador of the King, or the
other necessary documents. [d] Nullity resulting from a failure to
produce a mandate is always urged even after a verdict has been
given. Thus there are several points which would show the nullity
of this verdict. I call this decree, which partakes more of the char-
acter of a definitive verdict, a verdict, not an interlocutory decree,
[e] since this matter is estimated from its leading characteristic. Be-
sides, this decree, which directly and chiefly defines the whole matter
of the possession and ownership of these eight chests, is clearly a

[1] [*Code*, 7, 44.]

definitive verdict. [f] An interlocutory decree has the force of a definitive verdict, if it determines even indirectly an article looking to a definitive verdict; if the function of the judge comes to an end; if another verdict is not hoped for; if the interlocutory decree contains something to be given or to be done. [g] But when a verdict is null and void, it will not even be called a verdict. Therefore, the execution of it ought not to be ordered; when ordered, it ought to be canceled; when carried out, it ought to be reconsidered. In our case
233 nullity will the more check an execution, since the execution even of a valid verdict would be checked in this case, for I have said that these eight chests are at present retained to cover the expenses of the suit, to help meet losses. [h] "So beneficent is the right of retention that it prevails even against the execution of a verdict, and retention is especially privileged." Again, I beg his illustrious Lordship, the judge, to consider what I have said concerning the Dutch enemy, for these eight chests ought in no wise to be handed over to him. Why, if the Spaniard wishes to commit an offense against the laws of his King, and the ambassador asks the judge not to allow the subject to commit such an offense, will the judge not think this request of the ambassador just? Not only the law of the King forbids all trading with the enemy, [i] but all laws forbid it. We shall say that the Spaniard did not know that this man whom he made his agent was a Dutchman, to avoid concluding that he committed an offense, [k] since ignorance is taken for granted, at least for the purpose of excluding the hypothesis of an offense. Consequently, we shall conclude that we are not to understand that a mandate was really given because of this error in the character of the person of the agent, and that to this effect the Spaniard will doubtless reply, if he is questioned, and, therefore, that he has replied and now replies in this way, [l] because it is a well-known and well-established rule for all arrangements that that which one would probably have said and done, if he had been questioned, is regarded as said and done. Let an opportunity be given us to ask questions. We will show clearly the Spaniard's wish. We will show that it was not his purpose to go to law with the ambassador, and yet why do I drag in the ambassador here, against whom I find no decree handed down? Against whom will the execution of the decree be made? [m] The execution of a judgment is not directed against a man against whom the judgment has not been given.
234 But if his Lordship, the judge, thinks that he can correct that error which is noted in the first and second chapters dealing with nullity, [n] which would be, as it were, an error in nomenclature, since those eight chests are indicated in the decree by other brands than those which they are said in the petition to bear, [o] I will reply that a verdict which is null and void cannot be corrected or emended, even at once.

[p] A verdict which is null and void cannot be confirmed. Furthermore, a subsequent verdict, which has confirmed the one mentioned, is null and void, and that point about the error in the marks is not the only one which renders this verdict null and void, as has been said. His Lordship, our judge, who is an ordinary judge, clearly like an ordinary judge, can take this matter up for judgment again, and consequently, he may take it up again. But let him listen to us if he does not wish again to make a decision which is null and void. [q] An exception, based on nullity, is not properly an exception. Therefore, it is always offered in opposition, even when every exception is forbidden, and no preceding decree strengthens it, nor does the confession of a party concerned, although the efficacy of a confession is so great that a judge may lawfully pass from any stupid process of law whatever to any penalty whatsoever, even to the penalty of death.

a—Bar. Dec. C. de err. calc.
b—Alex. 6. cons. 171.; Ceph. 176.
c—Bologn. cons. 36.; Ceph. 77.; Alex. Ias. l. 2. C. de ed.
d—l. 24. C. de procu.; Menoch. cons. 345.; Flor. l. 1. si me. fa. mo.; Mara. sing. exceptio.
e—Menoch. cons. 88. 191.
f—Gail. 1. obs. 130.
g—l. 4. §. condemnatum. de re jud. ubi Ias. Rip.; Ceph. cons. 263.
h—Menoch. cons. 110.
i—l. 2. C. de comm.
k—Alc. 1. praes. 1.
l—Decia. 3. cons. 56. 86.
m—Decia. 2. cons. 108.
n—l. 5. §. pen. de rei vin.; l. 4. ubi not. de leg. 1.
o—Alex. 1. cons. 90.
p—Dec. C. de err. cal.; Menoch. cons. 270.
q—Flor. d. l. 1. si mens. fals. mod. dix.

CHAPTER XXIX

Of the Sale of Things Which Are Reckoned by Weight, Number, and Measure

If those articles which are regularly sold by number, weight, or measure are sold without specification, the condition is said to appertain to the sale, "if they be counted, weighed, or measured," [a] as the jurist clearly indicates by his distinction, that wine, for instance, is either all sold in bulk, however much there may be, at a specified
235 price, and that in this case we should understand that the sale was completed at once; or that it is sold in such a way that there is a fixed price for each jar, and that then the sale would be complete, when the wine has been measured, "since the transaction seems to be carried out on the implied condition that for each jar which shall have been measured out," says the jurist in that connection, [b] and the Emperor makes the same point of distinction. [c] Baldus holds the same principle with reference to the sale of land according to measurement, namely, that the sale would be conditional in this way, [d] and he says that this point is proved, where he makes this observation. Leasing and sale, in the case of either personal or real property, is conditioned on measurement, that is, it depends on the measurement found, even if fixed limits have been determined, [e] so that consequently before measurement has been made the transaction would not be effected under such a contract.

[f] Now, the following conclusion is considered correct by all writers, namely, that if we begin with the mass, and afterward mention measurement, we should say that the sale was made of the mass; the reverse would be true, if we began with a reference to measurement. It is said that in these circumstances the sale would be conditional in the second case, even if the seller had given the buyer liberty to use the purchase. The same distinction is made by Oldradus and commonly approved, that if we begin with words involving number or measurement, nothing more may be taken into consideration than is indicated by the specified number. Otherwise the added phrase covering measurement is by way of a misleading indication.

Now one is said to begin with a number, if the limits within which a certain body is contained are not expressly stated in advance, for we cannot otherwise say that a mass has been determined. For

instance, we begin with a number, "I sell you land to the extent of four acres with such and such boundaries." Thus the sale is defined by a specified number in the same remark, "I sell land of so many acres, which are there," and, therefore, the excess is kept for the seller. In these circumstances it does not prevent the sale from seeming to be 236
made according to measurement, because it has been made at a set price, and, therefore, also for the article taken as a whole. The argument drawn from the price [they say] applies to this contract, [g] but the fact that the price is a fixed amount is not indeed an argument on the other side.

Furthermore, objection does not lie in the fact that at the end may stand the phrase, "to have and to hold," etc., a clause which seems to have reference to a body taken as a unit, for the words of a contract must harmonize, so that later statements may not modify earlier ones. Besides, this clause is not placed in the body of the instrument, but in the administrative and supplementary sections, which have less effect in making a change. Therefore, the saying, "the last clauses modify earlier ones," would not count in their support, and consequently it would not even be necessary to add the clause, "canceling," etc., for that is understood even if the words were exactly the opposite. [h] Consult on all these points Decius, where one reads that in a case of doubt we may understand that a sale has been made according to measurement, since on this basis the transaction would be less prejudicial to the parties concerned. Besides, with this understanding reference to measurement should not be superfluous.

Still, one must consider whether the fixed price corresponds more to measurement or not; consult also *Consilium* 347 of Decius, where one finds that which may be inferred from the character of the price or of the payment as to what is sold or leased. Also in quoting from Imola, he says that the number is always looked at when the issue turns on a question not involving gain. Of course, in a matter involving gain the common distinctions hold, viz., whether one began with a number; whether we are concerned with the same clause. Still he holds the recognized distinctions in every case, and this procedure is right. Now, he says that when in a sale or a lease the property with its limits is described, and then a certain measure added, the sale is not determined in accordance with that measure, but that, by indicating a limit, everything is included which is within the limit. [1] The separate clause in this case serves as an indication, and yet an indication is not looked for. Take this case: "I sell land with so many jars 237
[of wine] on it." Here the number is for the sake of specifying the limit fixed. "I sell land, and I say that there are so many jars there,

[1] [1 inserted here because Gentili gives no letter. The note is at the end of the chapter.]

so many acres." The number is not to specify the limit fixed. In the same connection Decius says that if a number, which is not put in one chapter, *is* put in several other chapters one accepts the evidence furnished by the majority, and one part of the contract is interpreted in accordance with another. [2] The same doctrines also occur in *Consilium* 179, that the common rule is that a sale should be conditional on measurement, and should not be called complete before measurement has taken place, and that the conclusion is clear, when the contracting parties begin to explain the purpose which they had in mind by indicating a number or a measure. Decius discusses in that connection whether a sale is complete, and whether possession and ownership have changed hands by a transfer of the property when measurement has not yet taken place. However, he says all these points are taken into consideration, [i] and that Angelus and Castrensis, as well as Corneus, make this assertion, and one ought not to depart from them, although the law can be criticised. Decius understands "to the other person." However, [k] Odofredus interprets the word "transfer" (*tradantur*) in the sense of "measure" (*mensurentur*), and he does so on account of the preceding words and the subject-matter. He says that the wine in the case mentioned was sold in the fullest sense of the term, that consequently we cannot understand that it was handed over without being measured. Therefore, in that case the handing over would take the place of the measuring, and, when this was done, the wine, which was promised at the beginning, would seem to have been given. [l] Likewise, he remarks that if a transfer without measurement were considered, measurement would follow, and that, before the transfer of the property is made, the risk is the seller's, even after measurement is made, which is incorrect. [m] Likewise, he says that the first case is when the sale is a sale of wine in kind according to measurement; the second case, when it is a sale according to bulk, without measurement, and, therefore, that the opposition may be well put, it will be said
238 that the transfer will be received through measurement. These views Odofredus holds, and in opposition to them Decius says that in a case of doubt one ought not to depart from the words of the document. Likewise, he holds that a certain part can be alienated or possessed as undivided by reason of the quantity or by reason of the place. When there is every kind of uncertainty in respect to both place and quantity, then the dictum of Bartolus may be true; it is otherwise if there is uncertainty only with respect to one of the two. Bartolus says that *centum tabulae* is very uncertain on the score of quantity. But he is led to accept the opinion of Odofredus, that a clause of the agreement in this case would not seem to have trans-

[2] [2 inserted here because Gentili gives no letter. The note is at the end of the chapter.]

ferred possession or ownership, for it would be interpreted according to the nature of a contract, with an unqualified condition. Although the character of the condition may be modified with the consent of the parties concerned, still that is the case when there is an explicit statement, not if the clause of the agreement is posited absolutely, for the general clause would not modify a condition arising from the nature of the contract. [3] In like manner a clause of an agreement would have no effect, when there is uncertainty on the score of place and quantity, as there is here.

Yet against these conclusions Decius remarks that, although what has been said concerning an agreement may be true, still a transfer of the property in accordance with the agreement has the effect of measurement, so that the risk is transferred and the sale becomes complete, not because the implied condition of measurement is done away with, but by the transfer the result which is obtained by measurement is more fully accomplished, for when a transfer has been made, ownership changes hands, and the buyer assumes the risk, because he is found to be the owner. [4] Similarly, measurement, even when a transfer of the property has not taken place, transfers the risk, because owing to the measurement the thing is clearly seen to be sold according to bulk, and for the thing sold in bulk, although not transferred, the risk is the buyer's at once. However, the completeness would be greater from the transfer of ownership than from the transfer of risk. Now, if measurement leads to a transfer 239
of the risk, a transfer of the property will have the same effect more surely. Finally, what is said concerning the positing of a clause absolutely is true of an unexplicit clause, because a general clause would be determined in accordance with what precedes; still here there is a special clause, sufficient for the purpose, as has been said. [n] This is from Decius.

[o] Similarly both Parisius and Cephalus say that if any transfer whatever of property has taken place, even by agreement, the fact that measurement has not been made would do no harm, because, in accordance with the conditional contract, ownership would be transferred, although the condition were not yet satisfied, provided the condition be included. Cephalus cites other authorities also to the effect that even such a contract is called conditional as to the risk involved in the article, not as to other effects, when a transfer of the property has taken place, for he to whom the property has been transferred will seek the benefits of it, and, therefore, will be held to the resulting responsibilities. Consult Cephalus. Even in selling a thing which is regularly tested by tasting, the condition is

[3] [3 inserted here because Gentili gives no letter. The note is at the end of the chapter.]
[4] [4 inserted here because Gentili gives no letter. The note is at the end of the chapter.]

implied, "if it shall have been tasted." [p] One would scarcely buy otherwise, when it is observed that this condition, even when not expressed, is an antecedent condition. [q] Indeed, all writers hold this view, [r] whatever may be said at length on the other side by Azo. [s] Likewise a sale is called conditional which is made for a just price, on the ground that the price ought to be paid in advance. Now, Cephalus also in our first question about measurement says [t] that a contract would not be conditional, but would be unconditional and complete, so far as its substance goes, if the land is sold or leased on the basis of such and such a price for each acre, [u] but it would be conditional if merely the price were stated, and the contract would be complete, when the truth was noted, just as when a contract is made on a condition relating to the past. It would be a conditional con-
240 tract if so many acres are sold or leased from the field. But it would be conditional only as to the danger of destruction, because, if a thing is lost before it is measured, the seller suffers the loss, but in other respects the sale would be both complete and unconditional. [x] These principles Castrensis and others hold, and they occur elsewhere, [y] as one sees in Cephalus. Thus one ought to notice the way in which the language is framed, [z] for what is mentioned first is thought to show more the purpose in mind. He has a discussion there which shows more fully the conclusion that clearly, when the above mentioned distinction depends upon inferences, it follows that one may be led by the more convincing inferences to see that the distinction should not be observed, and that, although the mass may be mentioned first, still we may understand that the sale is made by measurement.

He says too that inferences of this kind are noted by Jason in a brilliant discussion in the above-mentioned opinion; that others are noted by Torniellus, to whose opinion Decianus then subscribed, and Castrensis himself in like manner sets down other inferences. The first case is when a place is named at the outset, and still a definite place is not specified; then measurement is mentioned, and afterwards the place spoken of is described. The second case is when in mentioning measurement the contracting parties have shown the greatest care, by indicating even the smallest part. Undoubtedly from this precise care and from the designation even of a very small part, it may be argued that the contracting parties have put their main reliance on measurement, at least in his opinion.[1]

a—l. 35. §. in his. de contr. empt.
b—l. 2. C. de peric. et comm. rei vend.
c—d. l. §. in his.

[1] See also Menochius, *De arbitrariis,* case 17, no. 3; Nonius, *Consilia,* 81, nos. 14, 15; Socinus, §. 8 of comments on *Digest,* 41, 2, 15.

d—l. 10. §. 1. de peric. et comm. rei vend.
e—Alex. 6. cons. 176.
f—Ias. 1. cons. 79.; Decia. 3. cons. 113.; Alex. 3. cons. 73. lib. 5. cons. 159. lib. 6. cons. 33.
g—d. l. 35. d. §. in his. vers. sed si ex doleario.
h—cons. 500.
i—l. 2. per illum text. a contrario sensu. C. de peric. et comm. rei vend.
k—d. l. 2.
l—l. cum incertus. et ibi Bar. de leg. 1.
m—d. §. in his.
n—d. cons. 179.
o—cons. 643.
p—l. 4. de peri. et comm. rei vend.
q—l. sicut. C. de act. empt.
r—l. 1. de peri. et com. rei vend.
s—l. ult. C. de contr. empt.; DD. ad l. si quis arbitratu. de V. O.; Alc. 8. cons. 69.; Ceph. cons. 10.
t—cons. 643.
u—Ceph. cons. 767.
x—d. l. sicut.
y—cons. 36.
z—l. quoties. de usur.; Decia. d. cons. 113.

1—Ex Oldr. et aliis, quos ibi allegat.
2—V. et Odd. cons. 50. n. 14. 15. et 16.
3—Bart. in l. 3. §. incertam. D. de acq. poss.; Ang. in l. quae de tota. §. 1. D. de re. vindic.
4—d. l. 2. a contrario sensu. ibi antequam tradantur.

241 CHAPTER XXX

Of the Completion of a Contract before the Instrument Is Finished

Decianus [a] also treats at great length another question, namely, whether a contract is complete or not before the instrument covering it has been made, especially when the contracting parties have talked of making an instrument. The question arises in the case of all those contracts which can be made without writing, for in others which under the law require writing, it is undoubtedly the case that no transaction has taken place, unless there is a document.

In the first mentioned contracts, then, [b] Decianus says that writing may be thought of as necessary only by way of proof. An illustration of this is a nuncupative will, even if the testator give instructions to have a copy of it made in writing. [c] So the doctrine stands. Besides, a thing can be proved in other ways, although there is a dictum [d] that the arrangements should be set down in writing.

Furthermore, says Decianus, that is called complete which has an efficient, formal, material, and final cause. A contract has all these elements, even if an instrument has not been made, for it has as an efficient cause the contracting parties themselves; it has a material cause in the agreement out of which the contract comes, a separate agreement made by each party. It is clear that the common agreement, put together in a single statement, is a formal cause; the final cause appears in the obligation, because the agreement is to the effect that there shall be an obligation, and about these points the situation is clear with reference to a man who in his own case thus recognizes the aforesaid agreement by shaking hands—an outward sign of a completed contract—and by other acts, which in that case are supported by evidence and performed by him.

242 Likewise to that point on which the present discussion turns, to the effect that there would be no agreement, when an agreement has been reached that a notary should be called, and a written document drawn up, [e] if the written document did not follow, Decianus responds that the law is speaking of the situation, and holds good, when it has been arranged between the parties concerned that the contract shall be valid only when a document has been drawn up; or when the contracting parties had it in mind not to enter into the contract before the matter is set down in writing, or before an agreement has been reached between them that it should be set down in writing. It is

otherwise if they enter into a contract at the outset and intend to have a document drawn up afterward by way of proof. Thus he explains the gloss there and elsewhere, and this gloss other writers seem to follow, and [1] Odofredus and Albericus, who write concerning the opinion of Speculator, pertinently remark in that connection that the form of procedure of the law mentioned is not observed in practice today. Decianus says too that Angelus clearly holds on the same passage that a definite arrangement between the parties to that effect is required, if the contract is to be binding only in case a document be drawn up. Still to others he would seem to hold the opposite opinion in that connection; the same is true of Castrensis elsewhere. Fulgosius, Jason, Socinus, Afflictis, Decius seem to follow him.

Decianus cites the eleventh opinion of Decius. In this opinion Decius writes that a contract would not be considered complete before the instrument was made, if it was stated that an instrument should be made to cover the transaction. This practice was followed at Florence. He says that it is not really an objection that it may not be called a contract in writing, because the fact that the arrangement is postponed to a future time, and that there is, therefore, an opportunity for a change of heart, would be enough. Indeed, Decius really holds this view, he does not merely seem to hold it, and Decianus does not act honorably in concealing these authorities in this way. [f] Why did he not even cite Decius, where Decius defends the position quite fully, and why does he not even cite in support of this side Castrensis in the opinions, of which Decianus says nothing? A contract or a will is not called complete unless the instru- 243
ment is drawn up which the parties or the testator have wished to have made; it is not, even though it may have been made for religious purposes, according to Oldradus, and in his writings the *res iudicatae* are quoted. Johannes Andreae and Johannes de Anania approve the same doctrine, and yet Decianus does not even mention them. There may be also other *res iudicatae* to the same effect; Cephalus also takes this view, and he cites Azo and [g] Placentinus. Furthermore, [h] Decius also says, concerning a transaction entered into by the Pontiff, that because the Pontiff wished a contract to be made by the Camera, this fact would show that there was no effective arrangement with him to make this a similar case of contracting parties who wish a contract to be reduced to writing. This is what Decius holds.

But Decianus says that the view of Castrensis is not true and should not be followed, and that the more commonly accepted view is against him. In a contract, which, in accordance with the form required by the common law, like an emphyteutic contract, or in accordance with the form required by a statute, or from the force of custom,

[1] [1 inserted here because Gentili gives no letter. The note is at the end of the chapter.]

requires writing, while the contracting parties say that there shall be an instrument or writing, it would be the more correct and the more commonly accepted opinion, that an agreement would not be called an absolute contract, even in the purpose of the contracting parties, unless a document should be drawn up, because it is taken for granted that the parties conform their action to the provisions of the common law or the statute. But if the contract is of the sort that under the common law, or under municipal law, or in practice requires a document only by way of proof, not by way of completion and validity, a document is not required, if it has not been expressly arranged between the contracting parties that the contract should be set down in writing, because in this case it is taken for granted that the parties concerned have made their action conform to the provisions of the law. [i] Salycetus presents this point well, and so Deci-
244 anus says that they should not seem to have wished to restrict themselves more than the law would bind them. He cites [k] also Faber, who says that a contract is called incomplete, when the parties concerned have expressly arranged, that they should not be bound until the instrument has been finished and published, a situation which frequently arises between cautious people who are afraid of being deceived. [l] Aretinus holds the same opinion, along with the distinction made above by Salycetus, which he calls entirely correct, and he adds that he has seen it observed in practice. The same writer says that a document covering the agreement would not be required for the completion and perfection of a transaction, but only by way of proof, unless the parties concerned have expressly arranged that the transaction would not be valid otherwise, without a document. [m] See Johannes Petrus de Ferrariis. [n] The same view Jacobus Butrigarius holds, when he says that we understand a contract to be made in writing, if it has been arranged that the contract shall hold, only in case a document is drawn up. This he says everybody maintains. It is the same, according to other writers, if I sell a thing to you, using this adversative clause, "But I wish a document to be drawn up"; but when I make a sale without condition, and when I call a notary and tell him to draw up a document, then it is not a contract in writing, but the writing is to serve as a proof. These remarks Decianus takes from Butrigarius.

But, pray, see if Decianus is not following constantly a kind of false reasoning, from a contract in writing to a completed contract. Indeed, the objection does not hold that the arrangement may not be called a contract in writing, because it would be enough to have the arrangement postponed to the future, as I have before responded in quoting from Decius. But Decianus continues with his authors, and praises [o] Barbatia for saying that he has seen this difficult ques-

tion applied in practice, when it is true that the parties concerned in the sale were in harmony concerning the article and the price, but said, "We will make the instrument tomorrow." Do they seem by using words of this sort to have wished to complete the contract of sale in writing? The result is important, he says, because in the meantime they would have an opportunity to change their minds, since 245
the contract cannot be thought of as finished until after the instrument has been published. But he concludes that it is not a contract in writing on account of the aforesaid reasoning of Salycetus, and because otherwise the contracting parties would be inconsistent in having finished the contract of sale by a simple agreement, and then in having canceled it, by postponing the matter to the following day. This is weak reasoning, and begs the question with reference to the completion of a contract, although this case is not the same as that of Decianus, about which we are talking here, nor is it the same as was that of Butrigarius, or of Faber, or the other. They are not dealing with cases where the instrument is made while the agreeing or contracting—such are the terms employed in drawing up an instrument—is in the process of making, but where the instrument is made subsequent to the contract. But Barbatia says that he carried the day in that case of his. Furthermore, Decianus cites in addition [p] Fabianus, as well as Afflictis, and consequently Afflictis is inconsistent, since he is cited to the opposite effect by Decius. Decianus quotes Angelus too, who thought that the parties concerned seemed to wish to have the contract published in a written form in the specific case when they say that it would not otherwise hold, unless set down in writing. This is the same kind of false reasoning, for his opponents will say that the argument counts in their behalf, so that, if the contract were in writing, it would also be conditional, pending, imperfect, until a written statement of it has been made. But the converse of their argument, that, if it were not in writing, it would not be a pending one either, would not hold.

He cites also Franciscus Aretinus, who replies to the dicta of Castrensis and says that he observes the common usage and practice to the effect that, although an agreement may be reached to call in a notary, still for that reason the document would not be called a contract made in writing, but only a paper by way of proof. Decianus himself adds that in reality he today sees such a usage and practice everywhere followed. On this point I would remark that the 246
doctor who testifies about the usage outside of the district where he has lived ought not to be trusted, indeed, that it is not even clear whether such a doctor ought ever to be trusted. [q] In fact, a number of writers hold this view, and testify that it is the common opinion that he should not be trusted, except perchance in the case of

a doctor who is dead and who has been a man of unusual authority. However, in the case of one who is dead the situation is less convincing, because the usage may have varied after his death. Now, so far as the place is concerned, [r] Decianus himself says that one ought to trust such a doctor only concerning the place in which he lives.

But, to resume, in the discussion in support of the same view, and in opposition to Castrensis, he also cites [s] Decius, where Decius says it is commonly held, that we should never say that a contract is made in writing in accordance with the wish of the parties concerned, unless it is specifically arranged by them that the contract shall not otherwise be valid. In that connection he replies to the dicta of Castrensis, and reaches the conclusion that his opinion is not correct. In that instance, however, the case is such that Sejus is under obligation to sell to Titius, and is held to make a paper for the sale, but Decianus says that the obligation to sell is complete before the paper has been drawn up, even if the condition is not satisfied. This has no bearing on the question, for a paper did not have to be made to cover that obligation. He says likewise that the dictum of Castrensis does not hold unless the substance of the contract has been withheld; that it does not hold also in cases where regard is paid merely to the custom of making instruments, and that to the custom regard seems to have been paid in cases of doubt. Still I doubt this, since it is in contractual, not in executive, matters that we imagine words spoken. He remarks too that when it was said that an instrument is to be made to suit the meaning of the said sound-minded Titius, that was said to the benefit of Titius. Therefore, one ought not to twist the statement and deny that the condition is satisfied. This argument is weak in the case of an onerous contract, where the burden may fall
247 on Titius, if the sale were completed beforehand.

Two other points which he has are true: first, that a notary may not finish an instrument in advance of the time set by the parties concerned; secondly, that a sale would be complete before the instrument was finished, if the whole price was to have been paid in advance, for the payment of the price proves a completed sale, although it would be absurd to have the price paid before [the purchase is completed]. This may be a limitation of the view of Castrensis.

But this very Castrensis is quoted in a certain opinion in opposition to himself, when he remarks on the aforementioned law *contractus* [1] that in that case the parties concerned had expressly arranged to regard nothing as settled until the writing had been finished. Consequently, Decianus infers that, since the doctor is

[1] [*Code*, 2, 3, 17.]

inconsistent, the view which he held in the *Consilia* ought to be followed. But in this case in the *Consilia* Castrensis is quoted in support of the former view, and everybody recognizes the fact that it is the real view of Castrensis.

Decianus quotes Gratus in support of his opinion that an agreement to ask a notary for an instrument would not give an opportunity for a change of mind, if the contract were otherwise perfected, and this view the doctors commonly hold. However, he does not reach the conclusion in this connection that for these reasons the contract is not conditional, even if there is not an opportunity for a change of mind. Furthermore, Gratus is talking of a completed contract, and to bring this point into our discussion would be doing nothing else than begging the question. Consequently, although Decianus adds that it is clear that the opinion which he himself defends is the common one, to me it is not clear. The opposite view is given by Oldradus, Johannes Andreae, Johannes de Anania, Fulgosius, Imola, Jason, Socinus, as well as by Castrensis, Decius, and Afflictis and is presented in *res iudicatae,* in which different conclusions are set down.

Decianus says the following reasoning is incontrovertible, namely, that we take it for granted that the parties concerned have adapted their action to the provisions of the law. But the law calls for instruments only by way of proof. In his case completeness is 248
proved most effectively, as he says, by reason of the repetition, because it had been said, " Done, done." To my mind, this reasoning is most ineffective, in the first place, because the repetition occurred at the same moment, and, therefore, would not be so binding as is taken for granted by [t] Decianus and by the others everywhere in their writings; in the second place, because these words refer to what has been done, and, therefore, the reasoning should set forth all the characteristics of the act.

Now, let us see how he replies to the points which are urged in support of the opinion of Castrensis, and we shall understand how we are to reply to the other incontrovertible reason. He says that two points are put forward in support of the view of Castrensis: first, the aforementioned law *contractus,*[1] at the beginning, in the line *quas tamen in scriptis fieri placuit,* combined with the line immediately following it. From these the following matters seem to be put on a parity, the agreement to contract in writing and the agreement to draw up an instrument. Decianus replies that a parallel is set up, when the condition has been expressly made that the contract holds if made in writing, or if an instrument to cover it be made; that it is otherwise, when, after making a contract unconditionally, they have

[1] [*Code,* 2, 3, 17.]

met to draw up an instrument. Just as Bartolus and the whole body of doctors understand the text in that connection, and in a special case Barbatius responds in this way. But Decianus by the above-mentioned arguments, by which he says that he has established this attitude on the part of the entire body, in my opinion, has not established it.

But he confirms this response most effectively, as he says; for there is the statement, "which still it has been decided to have set down in writing," and the word "still," without a connective, stands in opposition in law and in fact to what precedes. However, in what precedes reference is made to contracts, therefore to completed contracts, and therefore the words, "which still it has been decided to have set down in writing," we shall understand do not apply to contracts entered into unconditionally, but only apply to those
249 which the contracting parties have wished to have set down in writing. Therefore, if the adversative particle were not added, the contract entered into unconditionally, even if the statement had been made that it should be reduced to writing, would have been complete. I explain it more intelligibly as follows, that those words, "the contracts to be made in writing," clearly indicate nothing about finishing an instrument covering a contract, but apply to the actual entering into a contract in writing. The same thing is true of the words, "it has been agreed that these are to be entered in the instrument." These words likewise point to the formal procedure itself in transacting a piece of business, but they do not refer to a completed transaction. Well, so much for the law.

He quotes also the reasoning of Paulus Castrensis, that when the parties concerned have come together to make an instrument, it does not appear that they wished at that time to finish the contract. Consequently, the notary puts in the day on which he is summoned, but not the day when the contract was previously published. Therefore the day would not be that on which the contract was completed. To this reasoning Decius replies in various ways. Decianus approves his fourth response, that it does not follow from this fact that the contract was imperfect before, for the summoning of the notary is a repetition, as it were.

Decianus adds that the perfecting of a contract is regarded in a three-fold way: first, when it is not lawful to depart from it because of a change of mind; secondly, when the question of the risk to the thing made the subject of the contract arises; thirdly, when the question of the implement covering the contract comes up. [u] Now, the first process in perfecting a contract, which is based on the agreement only, takes place at once when an agreement has been reached, even if the contract be subject to a condition, for not even in that situation is a change of mind allowable. In the second process one

makes a distinction on noticing whether the contract is unconditional or conditional. In the latter case it would not be perfected until the condition was satisfied. In the third process a contract is not considered perfect until the property has been transferred. Consequently, in the present inquiry a contract would be perfect in the first particular, although, so far as the other two are concerned, 250
perhaps it would not be. It is enough that it should be perfect so far as the first process goes to prevent a change of mind, says Decianus, and he says that the reasoning is most effective. But I would say that it is most ineffective, because in this case we raise the question of the condition and the second process of perfection.

But he adds another reason, which one can not withstand, as he says. This reason is opposed to that of Castrensis. It is that if the parties concerned in contracting should say that they do not wish to make the contract in writing, and that they wish the contract to be regarded as perfected and finished, but that, however, they wish an instrument to be made to give a clearer proof and a lasting record, undoubtedly in this case the above-mentioned law will not apply. Still the notary, when summoned, will set down the day.

He also adds a third reason to the effect that if in a contract, for instance, covering a sale, an agreement to sell the property back has been added and if it has been arranged unconditionally that an instrument should be made to cover everything—and in this case according to Castrensis the sale will not be called complete—if later on an instrument of sale is made without including the agreement to sell back, the buyer in his opinion can not be forced to sell the property back, because before the completion of the instrument it would have been lawful for the buyer at any time to change his mind, and because the agreement can not be proved by witnesses. [x] Both of these conclusions are incorrect, Decianus says, for on the one hand an agreement can be proved by witnesses, and on the other hand, the buyer can be sued when the agreement has been proved. Consequently, the reasoning of Castrensis based on the instrument is incorrect. It is undoubtedly incorrect. The aforementioned law *contractus* [1] does not establish his opinion.

Consequently, in this inquiry let us follow the opposite view which is much better established, however, not by these arguments of Decianus, but by the arguments mentioned above of Salycetus, to which I think no good reply can be made. This view is supported also by the well-known rule [y] that in the case of contracts the interpretation 251
should be made against the man who takes his stand upon their words. The interpretation is always in favor of the man who takes his stand upon the promise.

[1] [*Code*, 2, 3, 17.]

a—vol. 3. cons. 64.
b—l. contrahitur. de pignor.
c—l. hac consultissima. C. de testa.
d—Castr. 1. cons. 60.
e—l. contractus. C. de fi. instr.
f—in cons. 159.
g—cons. 66.
h—cons. 404.
i—in d. l. contractus. et alibi.
k—in §. 1. Inst. de empt.
l—in d. §. 1.
m—in lib. emp.
n—in auth. novo jure. C. si cert. pet.
o—in rub. de empt. et vend.
p—de mo. sa. Sa.
q—Dec. cons. 142. et Mol. ad Dec. cons. 691. et ipse Decia. 2. cons. 62.
r—3. cons. 96.
s—in l. pactum, quod bona. C. de pact. in rubr. de consuet. et cons. 340.
t—2. cons. 39. et vol. 3. resp. 1.
u—gl. Bar. Bal. omnes ad l. 1. C. de per. et comm. rei vend.
x—d. l. contractus.
y—Alc. 8. cons. 2. 54. et 76. lib. 9. cons. 8.

1—Spec. in.

CHAPTER XXXI

Of an Appeal from an Incidental Judgment in a Case of Temporary Possession and of Proving a Suitable Bond, etc.

A LETTER TO A FELLOW-ADVOCATE

The matter has been finished, it is true, as we wished, but the judge was right in replying that those arguments which you offered on the impropriety of appealing in a case of temporary possession are general and subject to many limitations. In my response I noted the fact that the case at issue was not of a possessory character, but involved an incidental point concerning the acceptance of bondsmen. [a] In such an incidental inquiry, and in all others, an appeal is granted, although one is not granted in the case of an action for possession. Thus your arguments were outside the present inquiry. Most learned man, always remember to notice the form which the question takes, although you both may include, and perhaps also at times ought to include, what either may not be pertinent to the matter, or may be of no weight. [b] By such things some judges are often more influenced than they are by appropriate and sound considerations. Accept this hint from me.

On my side I shall gladly hear from you if I have committed any faults. You shall hear the faults which the other side has committed. I have told the story to the ambassador in a letter. Here I add to you one point, which concerns your aforementioned allegations, that the other party did not appeal from the decision of those who valued the merchandise in controversy. [c] Yet they could have appealed from this verdict, although they could not have appealed from a verdict in a case of temporary possession. [d] They
could maintain that it was lawful for them to appeal again within 252
ten days from the interlocutory decree establishing bondsmen, and could allege new reasons for appealing. Good heavens! what mistakes have been made by our adversaries, or what mistakes are being made by me in this estimate of their errors! Other mistakes of the parties concerned in the action itself for possession I neither mention to you, whom they concerned at that time, nor do I communicate them to others, lest it may injure us in other cases. Now, if you continue asking, I shall tell you that the party concerned could

have appealed from that part of the first verdict which had to do with releasing the deposit, although from the other part, in which the ambassador showed that he had possession, they could not have appealed, [e] for a deposit is not always canceled by a bond, and in this case reasons could be given why it should not be canceled. [f] Our adversaries did not see that one may take an appeal against the acceptance of bondsmen, or they did not know the decision in specific cases. But if the point had been made against us, then we should have proved [g] the suitability of the bondmen, and that matter the judge undoubtedly would have decided in the light of general principles.

King and Master:

In piratical cases there is no appeal through an edict of your Majesty, unless the appellant deposits the whole sum to the payment of which he has been condemned. Now, this case of Botelia, the Lusitanian, is a piratical case, whether the action involves only subjects of your Majesty, or involves subjects only in part, or even involves only a foreigner. These matters have been set before the judge of the Admiralty, who has given verdicts in behalf of the Lusitanian. Therefore, the Spanish Ambassador asks that justice be rendered to the subjects of his King in accordance with the very just edict of your Majesty, and that an appeal in this piratical case be not allowed, unless the sum has been deposited.

253 The Ambassador also thinks that another action is being taken in this case with reference to subjects of his King, not in accordance with the law, because there have been assigned to hear the appeal judges and professors of the municipal law of England, as well as doctors of the civil law, likewise of England. Now, cases of this sort between foreigners are judged under the civil law just mentioned, and this case has been judged under this civil law; and now when we must see, in the matter of an appeal, if a proper judgment has been rendered, we must see if a proper judgment has been rendered according to that law, according to which judgment ought to have been rendered. In this situation the Ambassador is not sure what those who practice another law may think. The Ambassador thinks that it is impossible for the reply to be made that it is the practice to have municipal judges also assigned in such a case, for this is done very rarely, and is only due to the growing power of the municipal judges. Besides, we shall find that it is the practice in cases which involve somewhat their municipal law—either in cases where subjects are concerned, or even foreigners as well. Now, one set of actions and the actions of one set of people are not brought to bear upon another set of actions or another set of people. The Ambassador does not fear the municipal judges or their law, but in defense of

the honor of his King he would be unwilling to depart from the established law of nations, if your Royal Majesty approves.

Your Illustrious Lordship, Most Upright Judge:

We do not object to giving a bond, but we make two requests in giving it: first, that a reasonable bond may be accepted, that is, one for about the true value; secondly, that such bondsmen as can be offered by his Lordship, the Ambassador, that is, by a sojourner, be accepted. Now, on this latter point your most learned Lordship knows that all expounders of the law always teach that even a juratory bond (a privilege, however, which we do not ask for) ought to 254
be accepted, if a person, because he is a foreigner, is unable to offer bondsmen. Now, this inability, as everybody thinks, is proved by a mere oath, and that, indeed on account of an inability to give bail, one may depend on a juratory bond is the practice followed every day. Both of these opinions are held by Jason, on l. 1, *Qui satisdare cogantur.*[1] Arguing from parity we say that the bondsmen whom his Lordship, the Ambassador, is able to offer ought to be accepted.

A Reply

Is the Statute Which Demands the Completion of Seventeen Years Satisfied When the Seventeenth Is Begun?

The question is whether one who has entered on his seventeenth year may be elected to a college, when the college has a statute which speaks of electing him who has completed his seventeenth year. And yet there seems to be no question at the first glance, for a year is certainly not finished when we have merely its beginning. [aa] "In all things I note that that is perfect which is complete in all its parts," says the law,[2] and other authorities make other statements to the same effect. [bb] "That man is not considered to be seventy years old who has entered on his seventieth year but has not yet passed beyond it," says another law.[3] And then to be so many years old and to have completed so many years, are one and the same thing, [cc] as another law[4] joined to the one just mentioned points out. [dd] That is said to be complete which has such absolute perfection that nothing at all is left over. Thus Decianus speaks in the light of these laws. That is full which is perfect and has no need of any addition, etc. [ee] Although a day begun is regularly considered as completed, yet a year begun is not regularly considered as completed, as Navarrus notes. He makes the reply too that that man

[1] [*Dig.*, 2, 8, 1,]
[2] [*Dig.*, 1, 2, 1.]
[3] [*Dig.*, 50, 6, 4 (3).]
[4] [*Dig.*, 27, 1, 2.]

was not ordained a priest in due form who lacked about forty
255 days of passing beyond his twenty-fourth year, no matter how little the one who ordered his ordination thought there was in those days; because the candidate for ordination ought to have finished that year, that is, to have passed beyond it and touched his twenty-fifth year, says Navarrus. And there are other statements to this effect and very many statements about the strict interpretation of the statutes.

However, these considerations are not decisive, and I think that the opposite view in the proposed question is in harmony with the law, so that that youth, for example, may be elected to the college in accordance with the statute. Now, I am led to adopt this view by the consideration [ff] that the doctors without exception give as their opinion that, in the case of gifts and honors and beneficent things, it is indeed sufficient to have touched the year; and that in those cases time begun is regarded as time completed. This view too Panormitanus says is the common one, although he himself thinks the law is otherwise.

Besides, no difficulty is caused by the fact that the law expressly mentions the completion of the year; [gg] for it is certain that statutes are brought under the interpretation of the common law. [hh] This gives rise to that definition among others, in this matter of elections, that if there is a statute to the effect that a man is to be elected to a college by the consent of all, the statute, in accordance with the common law, is understood to mean "by the consent of the majority." Statutes receive this interpretation, which is called "passive," from the common law. This is the general view of all with reference to the law *omnes populi*.[1]

[ii] Then, too, we are right in getting this result by wresting the words of the statute from their usual meaning, in spite of the fact that there is a statute to the effect that statutes are to be interpreted literally. [kk] Now, too, concerning this statute the view is expressed that it has little or no effect. [ll] It is the casuistical interpretation alone that this statute excludes; it does not exclude that which is in accord with the common law. [mm] For this is not only an acceptable, but also the necessary interpretation.

256 [nn] Statutes must be understood according to the rules of the law, and never in such a way that they become at variance with a case decided according to the common law. [oo] The wording of statutes must be brought into harmony with the interpretation of the common law. [pp] We must understand statutes in harmony with the art of men of letters, and thus there are countless cases in which there is no doubt. I note once more Baldus's statement about electing by the consent of all, and that this statute is to be understood, in accordance

[1] [*Dig.*, 1, 1, 9.]

with the common law, to be speaking of a majority vote, and likewise, that according to the common law, according to the interpretation of the common law, and according to the art of men of letters, in beneficent cases the man who has entered upon his seventeenth year is considered to have completed it. [qq] And thus the law which in beneficent cases requires a man to be of a certain number of years is understood to accept him also who has entered upon the last of those years.

And a settlement of the case is to be found in specific cases, and in specific cases also it appears to be as I have given it. A certain man was being prevented by a will from making disposition of the things left to him by that will, before the completion of his twentieth year, and yet he made his disposition at the beginning of his twentieth year. [rr] That the disposition stands, is the reply of Menochius, because the testator's words with reference to the completion of the year are to be understood of its beginning, when we are dealing with beneficent cases, and we may say that a year is sufficiently complete from the time that it is regarded as complete. Accordingly, we take the same position and maintain that the seventeenth year is said to be sufficiently complete from the time that it is regarded as complete. There will be no hesitation caused by the fact that Menochius is speaking of a will, while we are dealing with a statute. The principle Menochius states is general, [ss] and these two, the law and the will, are on a parity and afford each other arguments mutually. I do not as yet see what reply can be made to these arguments.

There is another argument in the fact that statutes of this kind which speak of admitting none into a college except him who has certain qualities are not to receive a rigid, but rather a kindly interpretation, and that in a doubtful case the man is to be admitted. [tt] This 257
is the reply of Ancharanus in dealing with the statute of a certain college in which care was taken that a [student] admitted to one study there at the beginning should not be able to change. He replies that the student not only can change, but can change within six months or even more, because a man is said to be still at the beginning, that is, at the beginning of several years; and this is done by broadly interpreted equity, as he says. In another statute there was a provision that one should not be received into the college unless he came from the state or territory. [uu] Baldus replied that the man should be received who came from the territory in a relative sense and in a generous interpretation of the phrase, for these statutes are to be taken in this liberal sense.

This statement about the territory is to be taken in a broad sense, but such a statute as this is to be interpreted strictly in case of a prohibition, as [xx] others infer from Baldus and Felynus, and yet they,

in dealing with a statute putting restrictions on receiving a foreigner into a college, say that a man who is eminent in learning may be received. [yy] In consideration of this preëminence and ability also, Alciatus makes many statements to the same effect elsewhere. But these matters, nevertheless, I do not mention, as if they would help this youth, my client, and yet he—an unheard-of thing—was a bachelor in his thirteenth year, as I shall show, [zz] so much as to make it clear that statutes are not to be interpreted harshly and that statutes of this sort are not interpreted harshly.

Another statute provided that a man should not be received into the college unless he were a citizen by birth. [aaa] The principle is unanimously supported, and has on numerous occasions been adhered to in practice, according to our authorities, that a man must be received if his father is a native-born citizen, although he himself chanced to be born elsewhere, for these statutes are to be taken in this liberal sense. This is the view which Jason expresses after reading, meditating, and adopting the views of the other most distinguished jurisconsults.

This is the view of others beside Jason, [bbb] and this opinion Ripa calls the common one, although he asserts too that many hold the contrary opinion, and he personally thinks that a distinction should be made whether at least the man was conceived in the
258 state, because a man's conception is to be regarded as his birth in cases beneficent for himself. Even this man, Ripa maintains, was born in the state and should be admitted into the college, although the statute admits none but the man born in the state. But the man would be considered born in the state who by mere chance was born outside of the state, especially if he was conceived within the state, for this, the beneficent interpretation, is to be taken here. I shall seize on this statement about the man conceived, [ccc] because if he is regarded as born, in cases advantageous to himself, then this youth likewise can scarcely lack anything of having passed beyond his seventeenth year. Others count the age from conception in their discussion of minors, [ddd] and they are refuted in that case solely because the edict regarding minors speaks expressly of those who have been born, [eee] and in the discussion it would have been prejudicial that one conceived should be regarded as one already born, as my teacher, Oddus, replies; for in this case the periods for restitution would be shorter. And so in the same discussion the twenty-fifth year, although only begun, is regarded as completed. [fff] In some cases the years are counted from infancy, and elsewhere otherwise.

But one point more, another statute decreed that no one should be admitted into the college unless his grandfather was a native-born citizen. [ggg] A man whose grandfather was born elsewhere, although

his great-grandfather was made a citizen, must be admitted as though descended from a native-born grandfather. So Menochius replied. Then, too, another statute had made provision that one should not be elected to the college by coöptation unless he were born in wedlock [hhh] But one made a legitimate child by a subsequent marriage is to be chosen, replied the same doctor.

Then there are statutes which forbid those joining a college, whose parents have plied a low calling, whether mechanical or manual; [iii] and yet the son of a surgeon—this calling is not sordid in this connection, though sordid elsewhere—may join a college, Cephalus replied, even though that surgeon practiced blood-letting, a subsidiary 259
part of surgery, a lowly calling and one which comes within the purview of the statute. [kkk] Then, too, the man should be elected by coöptation, whose father was a drygoods merchant—this trade is not lowly in this connection—and at the same time did other lowly work in addition, to supplement his trading, Menochius replied. [lll] And the same is true of the man whose father was a clerk. [mmm] Now, the office of a clerk is an humble one according to common law. [nnn] The same thing is true of another whose father was a treasurer for strangers, and at a fixed salary. Those cases always have the principle applied that statutes are to be taken in a liberal sense. In another statute mention was made of not receiving into the college of Doctor-Advocates a man who cannot be an advocate. [ooo] A clergyman who cannot plead must certainly be received as a doctor and also as an advocate, replied Alciatus, because the clergyman could plead in writing, and in person too in many cases, and this statute should receive a liberal interpretation.

There was another statute providing for the admission of the man who had a majority voting for him. [ppp] He too should be admitted, replied the same man, who has secured half the votes. [qqq] Of course, in case of doubt the decision should be given for admission, because it would be the more beneficent, as the same authority asserts.

[rrr] In the case of the two statutes, the first of which provides for the acceptance of a majority vote, and the other instructs us to follow the decision of a two-thirds vote, the former should be followed and should be preferred to the latter for the reason especially that it would be more beneficial, as Cephalus replies, [sss] in spite of the fact "that the later arrangements are more binding than those which precede them." [ttt] Furthermore, as to the number of votes, I observe that, although it was stipulated by another statute that the man should be considered elected who had been elected by two-thirds of the votes, and although a certain person had received twenty-seven out of forty-
two votes, Menochius replies that he is considered elected, and De- 260

cianus upholds him. Menochius also says that the man is considered elected " by everybody, by the common consent of everybody " who has had cast against him only two or three votes. Do we need more arguments against a precise, superstitious, harsh, and inflexible interpretation of the statute? [uuu] Statutes ought not to be interpreted in the Judaizing manner. This is a common remark. " Even if the world is quite full of these Judaizers, although they may not be Jews, still it is a shame to the world, so to speak," to use the words of Baldus. However, if the person mentioned is thought of as elected " by everybody, with the common consent of everybody," although he had three votes against him, this young man too may be elected who lacks months only to finish seventeen years, even if the statute with greater strictness should require the election of him who has completed the entire seventeen years " without any break whatsoever." [xxx] Thus the argument holds in passing from persons to times. Do we still argue, or do we delay longer after having quoted clear decisions in specific cases?

Now, what has been said, or can be said, in opposition furnishes no objection. We can see that these arguments have been refuted and are inapplicable to our inquiry. What has been said of the words " to be completed " is not an objection, for the reply has been made that the seventeenth year is understood as completed in our inquiry, and to have completed is not to have exceeded, but something less. [yyy] " But should one have exceeded the fourteenth year to be able to make a will or is it enough to have completed it? " In this way the law interprets the words " to complete " and the word " beginning." [zzz] Consequently, some people have been able to interpret, even of years entered upon, the statement which the laws make about the age of contracting marriage, namely, that a woman ought to have " the full number of," a man ought " to have completed " the years specified. [aaaa] They are not even refuted by the fact that the words
261 " to complete " cannot be taken of things entered upon, but for other reasons. It is a beneficent thing that in that situation the year entered upon should not be regarded as complete, in order that there may be a fuller and better considered deliberation in this important matter, and in this grave servitude—[bbbb] that is the phrase—of marriage. [cccc] The same sentiment is expressed in the case of spiritual marriage on account of the very high condition of religious profession. [dddd] However, a day begun is regarded as complete even in marriage, as it is in the case of a will. Some people are not troubled either in ordinary practice if a week is lacking, for if the lack is a slight one it may in ordinary practice be called complete. Undoubtedly when wisdom takes the place of age, in that case attention is not even paid to years. Suppose we should say the same thing in

our case? Our statute ought to be interpreted, not in a metaphysical way, but according to ordinary practice. Besides, one should regard the fact that he is a boy who is familiar with more languages and with more arts than another boy of his age would be. The risk of this thing has been taken by the community more than once, even also when he was a collector, and in point of fact a prior, in the middle of his fourteenth year. Take the risk now, if he can do more than others of his years. I come back to the words "to complete." Ignatius writes to the Trallians of the baptism of our Lord Jesus, "when he had completed three decades," although he was aware of the statement [eeee] "Jesus himself began to be about thirty years." [ffff] And the Evangelist himself says of the day of circumcision, "when eight days were accomplished for the circumcising of the child," speaking without doubt of an eighth day not in the past, not finished. The commentator in this connection interprets it so, that "to be accomplished" does not mean to be absolutely completed and satisfied, but to have come and to have begun, and in this way the words, "to complete," are frequently taken in the Scriptures, so that another person would be in error in that connection in turning and distorting the matter so as to get another meaning. But suppose the writer of the statutes, an Archbishop, versed in the Scriptures, has followed
this practice of the Scriptures? A student of the law would have 262
interpreted that word in no other way than the law interprets it in beneficial matters—begun instead of completed. [gggg] We must interpret words according to the setting of the speaker. Our speaker seems to have clearly distinguished the words "to pass beyond" from our word, in writing "he who has finished the seventeenth, and has not passed beyond the twenty-sixth." I could believe that the founder would not today answer otherwise, if he were living, since today neither so high nor so exact a number of years is taken into consideration, and besides the successive grades are sought much earlier and granted much more easily throughout the Academy.

[hhhh] Furthermore, it is a common rule and it is an especially convincing inference, that that principle is understood to be extended, which, if there had been a call for it, would have been extended. [iiii] Navarrus adopts this rule, and he actually follows the view mentioned that one born by chance elsewhere ought to be accepted, even if the statute provides for a native. As for the others, good heavens! how frequently do they follow it even on grounds slighter than those which have been given by us in our case. However, here we are not even talking of extension of application, but of the interpretation of a word which would the more plausibly hold. [kkkk] For instance, an explanation is accepted, when an extension is not accepted, [llll] for an explanation makes no change. The explanation put forward by us

would not even be called a legal fiction, [mmmm] for it is not indeed a fiction, [nnnn] and even a legal fiction itself is the truth. [oooo] The election was opposed, or rather the objection was made to the candidate of Menochius that he suffered from a certain deformity, on account of which under the Levitical law he could not have been chosen to the ministry of the altar, which Menochius' client desired. Menochius says that today such regard is not paid to deformity. We hold the same view that such great attention is not paid to periods of time today, when in the first place there are very many bachelors, and when
263 in the second place this youth could have been made a master before reaching the period of life during which the statute provides that candidates are to be questioned on grammatical matters only. It is a severe statute if it allows one to be admitted as a scholar of this College [pppp] only in case he can now be created a doctor under the common law, and thus be in the College of Doctors; a man who can perform other duties in the commonwealth itself. But neither ought severity to be taken for granted nor severity in a statute, [qqqq] for severity is exacting justice, harsh, the greatest injustice, the greatest torture, etc.

Besides, has the statute thus far been interpreted in any other way than I say it ought to be interpreted? Let a case be shown of the formal rejection of anyone on the ground that he has not exceeded the seventeenth year, provided he was in the seventeenth year. It will be easier to point out individuals who have been admitted at an earlier age. Let an investigation be made. I pass over what is very often mentioned here, i.e., [rrrr] that it has been wont to occur very often at Toulouse and Avignon that an election to a college is announced owing to a bribe, in which case the statutes are violated, and the great crime of simony is committed. But the statutes are observed most scrupulously, most strictly, to the very dotting of the i's and the crossing of the t's, when places are to be allotted for nothing. And shall nothing be granted as a favor to the father who makes the request, a father who has in no wise deserved ill of the Academy? And as a favor to the King who, for a second time, and with a greater right to be heard, requests to have the boy accepted, shall not this concession be freely made? And will they not listen to justice which I have shown to be clearly for the boy? [ssss] A just interpretation prevails even over an exact meaning. I have set forth the just interpretation, that in our case the year begun should be accepted in place of the completed year, if that is just which is in accordance with the law, and this is the interpretation of the law. [tttt] Furthermore, not only the authority of the law gives words their true and exact meaning, but this meaning should be taken on the warrant of
264 him who fixes the law, that such and such a word should be understood thus in such and such cases.

[uuuu] It ought not even to be said that it is a fictitious case when a thing begun is taken as a thing completed, for since being regarded as a certain thing is expressly and peculiarly provided in this case as being a certain thing, they ought to be regarded as being on a parity. These observations Ancharanus makes to the statute which forbids anyone to hold a magistracy unless he be a native-born citizen, so that Titius could be the magistrate, inasmuch as he was received into citizenship with the proviso that he should be regarded as native-born in all respects. But to this scruple about the legal fiction reply has been made above also, so that it does not prejudice the case, [xxxx] as the same Ancharanus and others (if anyone should have urged the objection) say, that in the statutes it is not enough that a thing should be regarded in a certain light, unless it is the very thing which the statute requires.

Finally, it may be said here that the seventeenth year ought to be counted from the last act of election, which follows the year of probation, when this young man will be several months beyond the seventeenth year, for as to the fact that the law has a provision concerning the age mentioned, and speaks of the very first step in the election, still it does not say that this age should be required, and it says that the election ought to be made in the manner and in the form and in accordance with the provisions written below. And therefore—and this ought to be noted—it makes one act of the whole election, in which the approval and the year of approval are included. Still to urge this is an act of supererogation, because the arguments already given are far the most convincing.

a—Bart. l. ult. §. pen. de appell.
b—Alb. 4. de jur. int.; Decia. apol. c. 15. n. 11.
c—Ang. Soc. l. 9. qui sat. cog.; Ang. add. Bar. C. de ponderat.
d—Saly. l. 28. C. de appell.; Alex. 6. cons. 64.
e—Pan. c. 2. n. 24. de seq. possess.
f—DD. l. 5. §. 1. qui sat. cog.
g—Rom. d. l. 5. fi.; Menoch. de arb. cas. 65.
aa—l. 1. de orig. jur.
bb—l. 3. de ju. imm.; Alb. 5. de nupt. 1.
cc—l. 2. de excus.
dd—Decia. 2. cons. 36. & cons. 73.
ee—Navarr. cons. 6. tit. 14. lib. 1.
ff—Gl. Alb. alii l. 3. de minor.; gl. Host. Panor. c. 7. de elect.; Bar. l. 74. ad Treb.; Bal. pe. C. qua. di. le. ce.
gg—Dec. c. 18. de resc. c. 47. de appell.
hh—Bal. l. 10. de pact.
ii—Alex. 1. cons. 19. & lib. 4. cons. 85.
kk—Bar. l. omnes populi.; Dec. c. 3. de constit.; Rol. de lu. do. q. 35.
ll—Menoch. cons. 11. 227.; Rol. d. q. 35.
mm—Bal. l. 1. de S. C. Sil.; Anch. c. 1. n. 63. de constit.
nn—Ceph. cons. 642. 616.
oo—Anch. cons. 400.; Alex. 2. cons. 115.
pp—Alex. 1. cons. 9.
qq—Gl. d. l. 3. de ju. im.; Bal. c. 41. de off. del.
rr—Menoch. cons. 839.

ss—Decia. 1. cons. 13.; Ceph. 526. 638.; Menoch. 95. 106.
tt—Anch. cons. 99.
uu—Bal. 2. cons. 183.
xx—Boss. de unio. item de paen.
yy—Alc. lib. 1. de V. S.
zz—Ias. 3. cons. 58.
aaa—Ias. 3. cons. 77. & l. 86. de leg. 1.
bbb—Rip. de priv. cont. ca. pen. 182.
ccc—l. 7. de stat. hom.
ddd—Alb. l. 1. de minor.
eee—Odd. de re. in int. q. 2. art. 7.
fff—c. 2. dist. 77. gl. & c. ult. de aet. & qual.
ggg—Men. cons. 677.
hhh—Men. cons. 227.
iii—Ceph. cons. 611.
kkk—Men. cons. 648.
lll—Men. cons. 552.
mmm—Crav. cons. 163.
nnn—Men. cons. 729.
ooo—Alc. 2. cons. 30.
ppp—Alc. 2. cons. 42.
qqq—Alc. l. 85. de V. S.
rrr—Ceph. cons. 601.
sss—l. ult. de const. pri.
ttt—Menoch. cons. 96.
uuu—Alex. 6. cons. 148.; alii ad l. omnes populi.; Anch. c. 1. nu. 263. de constit.; Bal. 1. cons. 294.
xxx—Decia. 3. cons. 82.
yyy—l. 5. de testam.
zzz—l. 4. de ri. nupt.; l. 24. C. de nupt.; c. 3. de de. impu.; Alb. 5. de nupt. 1.
aaaa—Pan. c. ult. de desp. impub.
bbbb—Alb. de nup. 3.
cccc—Sanchez. de matr. lib. 2. disp. 24.
dddd—Sanchez. de matr. lib. 1. disp. 16.
eeee—Luc. 3.
ffff—Luc. 2. ubi Trem. & Beza.
gggg—Rip. l. ex facto. §. 1. ad Treb.; Alc. lib. 2. de V. S.; Menoch. 2. prae. 6.
hhhh—Ias. l. 25. §. 1. de lib. & post.; Zas. §. actionum. de act.; Decia. 3. cons. 55. 86.
iiii—Nav. cons. 41. tit. 5. lib. 3.
kkkk—Decia. 2. cons. 32.
llll—Decia. 1. cons. 8.
mmmm—Ut not. Gothofr. in l. 23. ff. si quis omis. cau. testam.
nnnn—Men. cons. 227.
oooo—Menoch. d. 96.
pppp—Bal. Fely. c. 41. de off. deleg.
qqqq—Decia. 2. cons. 84.
rrrr—Navar. cons. 47. tit. 3. lib. 5.
ssss—Ceph. cons. 692.; Anch. c. 1. n. 35. de constit.
tttt—Anch. c. 1. n. 261. 264. de constit.
uuuu—Anch. d. c. 1. nu. 265.
xxxx—Anch. d. c. 1. nu. 277.

THE END OF BOOK II

INDEX OF SUBJECTS[1]

[Figures refer to pages of original in outer margin of translation.]

[1] Adapted from the original Latin Index by Thomas H. Healy, A.M., LL.B., Secretary, School of Foreign Service, Georgetown University.

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INDEX OF AUTHORS CITED BY GENTILI[1]

In preparing this Index our purpose has been to identify and arrange in alphabetical order all the authors and books, jurists and juristical compositions mentioned by Gentili directly or indirectly in the text of the *Hispanica Advocatio* or in the marginal notes thereto. The names of a few men and the titles of a few books can not be determined with certainty because they are not to be found in any accessible biographical or bibliographical records[2] or because Gentili's references are so obscure as to prevent us from identifying with confidence the works cited, but a large majority of them, we hope, have been made out correctly.

Unless the information was unavailable or the author too well known to need comment, a notice of his nationality and date follows each writer's name; then, if he has been cited in the text, the pages of such citation are given in arabic numerals; finally comes a list of his works to which reference has been made in the marginal notes, the location of these references being indicated by book, chapter, and letter. The letter is followed by a numeral if it has been used before in the same chapter. Where the notes have been grouped at the ends of chapters in the translation, a doubled letter takes the place of the numeral. Thus II, 1, n 2 in the list of authors given below will be II, 1, nn at the end of a chapter.

To identify any marginal reference the following suggestions may be of use. Observe in the collections at the ends of chapters how the separate notes under any letter are marked off by semicolons. The first abbreviation in the note is usually the initial letters of the author's name. The index will show it in expanded form. If the rest of the note involves the abbreviation of a book-title, this will be identified easily by a glance at the works accredited to the author. In the case of a reference to the Civil or Canon Law, the reader should keep in mind the method employed by Gentili in referring to them as explained in the prefatory remarks in this volume.

But sometimes Gentili omits the general rubric in citing a law or even a section in a law in the Digest, Code, or Institutes. The following laws or sections so cited in the notes may be identified thus:

l. actus	is probably	D. 50. 17. 77	l. Gallus	is probably	D. 28. 2. 29
l. a divo Pio	" "	D. 41. 1. 15	l. lecta	" "	D. 12. 1. 40
l. admonendi	" "	D. 12. 2. 31	l. omnes populi	" "	D. 1. 1. 9
l. Atinia	" "	D. 41. 3. 4. 6	l. quae dotis	" "	D. 24. 3. 33
l. Celsus	" "	D. 41. 3. 27	l. qui cum alio	" "	D. 50. 17. 19
l. cunctos populos	" "	C. 1. 1. 1	l. saepe	" "	D. 42. 1. 63
l. diem functo	" "	D. 1. 22. 4	l. ut vim	" "	D. 1. 1. 3
l. diffamari	" "	C. 7. 14. 5	§ Cato	" "	D. 45. 1. 4. 1
l. frater a fratre	" "	D. 12. 6. 38	§ duo fratres	" "	D. 45. 1. 122. 6

[1] Prepared by Arthur Williams, lately Instructor in Latin in Princeton University.

[2] The principal books of reference used are: ZEDLER, *Grosses Universal Lexicon* (Halle and Leipzig, 1732—); ERSCH and GRUBER, *Allgemeine Encyclopädie* (Leipzig, 1818—); LIPENIUS, *Bibliotheca Realis Juridica* (Leipzig, 1757); SAVIGNY, *Geschichte des römischen Rechts im Mittelalter* (second ed., Heidelberg, 1850); *The British Museum Catalogue; Catalogue Général de la Bibliothèque Nationale* (Paris, 1897—); *Corpus Juris Civilis;* and *Corpus Juris Canonici.*

The rubric "si cert. pet." is sometimes used for D. 12. 1.

For the Canon Law rubric "de re jud." see under "de sententia et re judicata."

Some abbreviations used in the marginal annotation are:

add., adnotationes
add. no., addita nota
c., canon, (or) caput
cons., con., consilium
d. (plural, dd.), dictus (the aforesaid)
DD., doctores (authorities)
decis., decisio
disp., disputatio
dist., distinctio
eo., eod., eodem (on the same title)
fi., finalis, (or) fine
gl., glossator
ibid., ibidem
l., lex
lib., liber
n., nu., num., numerus
not., nota
obs., observatio
p., pagina
pen., penultimus (next to the last)
prin., principio
q., quaestio
rep., repetitio
rub., rubrica
tit., titulus
to., tomus
tr., tractatus
ult., ultimus (the last)
vers., versus (line)

The numeral 6 refers to the Liber Sextus Decretalium of the Canon Law.

THE CLASSICS OF INTERNATIONAL LAW

This series, which includes the classic works connected with the history and development of international law, was undertaken by the Carnegie Institution of Washington in 1906, at the suggestion of Mr. James Brown Scott, then Solicitor for the Department of State, under whose supervision as General Editor the series has since been published. On January 1, 1917, the project was transferred to the Carnegie Endowment for International Peace and the publication of the series is being continued by the Endowment's Division of International Law, of which the General Editor of the Classics is the Director.

The republication of these classics has been undertaken principally on account of the difficulty of procuring the texts in convenient form for scientific study. The text of each author is reproduced photographically, so as to lay the source before the reader without the mistakes which creep into a newly printed text. An introduction is prefixed to each work, giving the necessary biographical details concerning its author and stating the importance of the text and its place in international law. Tables of errata in the original are added when necessary, and notes to clear up doubts and ambiguities or to correct mistakes in the text are supplied. Each of the Classics is specially edited by an expert in international law and is accompanied by an English version made expressly for the series by a competent translator.

The following works have appeared and are now on sale. The price is indicated for each work. They can be obtained by remittance to the publishers, either the Clarendon Press, Oxford, England, or the Oxford University Press, American Branch, 35 West 32d Street, New York, N. Y., who are the regular selling agents for the Clarendon Press in this country.

Ayala, Balthazar: De Jure et Officiis Bellicis et Disciplina Militari. Edited by John Westlake. 2 vols. 1912. Price, $7.00. [No. 2 of the series.]

Vol I. A Photographic Reproduction of the Edition of 1582, with portrait of Ayala, Introduction by John Westlake, etc. xxvii + 226 p.

Vol. II. A Translation of the Text, by John Pawley Bate. xii + 250 p.

Gentili, Alberico: Hispanicae Advocationis Libri Duo. 2 vols. 1921. [No. 9 of the series.]

Vol. I. A Photographic Reproduction of the Edition of 1661, with an Introduction by Frank Frost Abbott and a List of Errata.

Vol. II. A Translation of the Text, by Frank Frost Abbott, with an Index of Authors prepared by Arthur Williams.

Legnano, Giovanni da: De Bello, De Repraesaliis et De Duello. Edited by Sir T. Erskine Holland. 1 vol. 1917. xxxiii + 458 p. Price, 42s. 6d. in Great Britain; $13.00 in the United States. [No. 8 of the series.]

1. Collotype of the Bologna Manuscript of *circa* 1390, with Extended and Revised Text of Same, Introduction, List of Authorities Cited, etc., by Sir T. Erskine Holland, together with Photograph of Legnano's Tomb.
2. A Translation of the Text, by J. L. Brierly.
3. A Photographic Reproduction of the First Edition (1477).

Rachel, Samuel: De Jure Naturae et Gentium Dissertationes. Edited by Ludwig von Bar. 2 vols. 1916. Price, $4.00. [No. 5 of the series.]

Vol. I. A Photographic Reproduction of the Edition of 1676, with portrait of Rachel, Introduction by Ludwig von Bar, and List of Errata. 16a + x + 335 p.

Vol. II. A Translation of the Text, by John Pawley Bate, with Index of Authors cited. 16a + iv + 233 p.

Textor, Johann Wolfgang: Synopsis Juris Gentium. Edited by Ludwig von Bar. 2 vols. 1916. Price, $4.00. [No. 6 of the series.]

Vol. I. A Photographic Reproduction of the First Edition (1680), with portrait of Textor, Introduction by Ludwig von Bar, and List of Errata. 28a + vi + 148 + 168 p.

Vol. II. A Translation of the Text, by John Pawley Bate, with Index of Authors Cited. 26a + v + 349 p.

Vattel, E. de: Le Droit des Gens. 3 vols. 1916. Price, $8.00. [No. 4 of the series.]

Vol. I. A Photographic Reproduction of Books I and II of the First Edition (1758), with portrait of Vattel and Introduction by Albert de Lapradelle. lix + 541 p.

Vol. II. A Photographic Reproduction of Books III and IV of the First Edition (1758). xxiv + 376 p.

Vol. III. A Translation of the Text, by Charles G. Fenwick, with translation (by G. D. Gregory) of Introduction by Albert de Lapradelle. lxxxviii + 398 p.

Victoria, Franciscus de: Relectiones: De Indis and De Iure Belli. Edited by Ernest Nys. 1 vol. 1917. 500 p. Price, $3.00. [No. 7 of the series.]

1. Introduction by Ernest Nys, and Translation of Same, by John Pawley Bate.
2. A Translation of the Text, by John Pawley Bate.
3. Revised Text, with Prefatory Remarks, List of Errata, and Index of Authors Cited, by Herbert F. Wright.
4. A Photographic Reproduction of Simon's Edition (1696).

Zouche, Richard: Juris et Judicii Fecialis, sive, Juris inter Gentes, et Quaestionum de Eodem Explicatio. Edited by Sir T. Erskine Holland. 2 vols. 1911. Price, $4.00. [No. 1 of the series.]

Vol. I. A Photographic Reproduction of the First Edition (1650), with Introduction, List of Errata, and Table of Authors, by Sir T. Erskine Holland, together with portrait of Zouche. xvi + 204 p.

Vol. II. A Translation of the Text, by J. L. Brierly. xvii + 186 p.

(*In Press*)

Bynkershoek, Cornelius van: De Dominio Maris. 1 vol. [No. 11 of the series.]

1. Introduction by James Brown Scott.
2. A Translation of the Text, by Ralph Van Deman Magoffin.
3. A Photographic Reproduction of the Edition of 1744.

Gentili, Alberico: De Legationibus Libri Tres. [No. 12 of the series.]

1. Introduction by Ernest Nys.
2. A Translation of the Text, by Gordon J. Laing.
3. A Photographic Reproduction of the Edition of 1594.

Grotius, Hugo: De Jure Belli ac Pacis. [No. 3 of the series.]

1. A Translation of the Text, by Francis W. Kelsey, with the assistance of Henry A. Sanders and Arthur E. Boak.
2. A Photographic Reproduction of the Edition of 1646.

Pufendorf, Samuel von: De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo. [No. 10 of the series.]

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